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May 3, 2023

Dear Judge:

It is a pleasure to recommend Daniel Wetterhahn for a federal clerkship. I have had the pleasure of teaching Daniel in two courses and I can speak to his exceptional abilities as a student and legal thinker. His transcript speaks for itself: all As with a single B+, and a grade point average of 3.86, near the very top of his class; a Masin Family Academic Silver Award for the second highest grade in his Contracts class; and his success on our Moot Court team, which is consistently ranked the best in the nation.

In my Constitutional Law I course, Daniel was an outstanding student who impressed me with his insight and sharp analytical skills. He demonstrated a high level of discipline and dedication to the course, always coming prepared and offering thoughtful insights into the doctrine and constitutional theory. As someone who desires to be a prosecutor, Daniel brought a different perspective from many other students and he was attentive to the criminal dimensions of many of the cases we read. His final examination was excellent and he earned an A in the class.

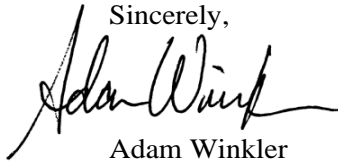
I had an even better and more in depth opportunity to observe Daniel's skills in my Supreme Court Simulation course. The class is a hands-on, experiential class in which we take cases currently pending before the Supreme Court of the United States and we argue and decide them. The students play the role of justices and advocates, depending on the case, and to excel in the class requires precisely those skills needed by a good judicial clerk: students must prepare for oral argument; think through how to resolve complicated and difficult open questions of law; and write persuasive opinions. And because the students are the ones speaking most of the time, it gives me an unusually good chance to examine how they approach legal problems, reason through them, and deliberate with others. On each of those scores, Daniel was exceptional. As a justice, Daniel came well prepared to every argument and showed his desire to take on the most difficult questions posed by the cases. He was not dogmatic in his thinking and was always open to hearing different viewpoints. As an advocate, he was able to clearly and directly answer questions, explain complicated issues, and think on his feet. His opinion in the case he was assigned to write, *Sackett v. EPA*, was the best in the class: straightforward, careful, smart, and easy to follow. Indeed, he consistently produced high-quality work and showed an impressive level of analytical skill and intellectual curiosity.

May 3, 2023

Page 2

I have no doubt that Daniel will make an exceptional federal clerk. His strong work ethic, sharp analytical skills, excellent writing ability, and thoughtful approach to legal reasoning make him an ideal candidate. I highly recommend him. If you have any additional questions or wish to talk through Daniel's candidacy, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Winkler", with a stylized, cursive script.

Adam Winkler

UCLA School of Law

NOAH D. ZATZ
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June 6, 2023

Dear

I very strongly recommend **Daniel Wetterhahn** for a clerkship in your chambers. Dan is an outstanding student whom I've taught in two courses: Contracts and Labor Law. In both of them, he has demonstrated an incisive mind and deep intellectual curiosity.

In Fall 1L Contracts, Dan earned an "A+" grade based on his exam performance in a large 1L section of about 80 students. He was one of only two students who ranked in the top 10 on all three sections of the exam: a set of subtle, technical short-answer questions, a traditional fact-pattern issue-spotter essay, and an essay requiring students to synthesize disparate doctrinal elements that raise a recurring problem and to assess normatively a particular proposed approach to that problem. Dan was also an active and lively contributor to class discussion. On several occasions I noted his particularly sharp comments as a volunteer, including a conceptually sophisticated point where he used the idea of a hypothetical agreement to explain the existence of a contract in a scenario where there was a promise but no mutual assent. Dan was a regular presence in office hours, eager to discuss the underlying policy issues, regardless of whether there was an instrumental connection to exam preparation or the like.

In Spring 2023, I had Dan again in my course on Labor Law & Collective Action. And again, Dan excelled. In a curved class of 65 students, Dan earned an "A" based on the final exam, which consisted of the same three types of question described above for Contracts. On one of the short-answer questions, I made a note that his answer (unlike any other) was not only perfect according to my rubric but so outstanding that it deserved extra credit. On the traditional issue-spotter essay, his answer was among the top handful in the class and stood out as the only one to receive maximum credit for overall quality of writing and analysis; I noted that his answer was exemplary in clarity, structure, and depth. Dan was quieter in this class, but not for lack of engagement; we again had multiple lively conversations outside of class about the subject matter of the course.

In addition to the incisiveness of his own reasoning, Dan has impressed me with his curiosity, open-mindedness, and good-natured approach to disagreement. He has an eagle eye for the weakness in an argument but also the humility to probe it gently and with the awareness that the error might be his own.

All told, Dan Wetterhahn would be an excellent law clerk and a pleasure to have around. Please do not hesitate to follow up if I can answer any questions or address any concerns you might have.

Sincerely,



Noah Zatz

DAN WETTERHAHN

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The attached is an ersatz opinion prepared for a Supreme Court simulation I took in Spring 2023. It is structured to look like a genuine Supreme Court opinion. The opinion is based on the case *Sackett v. EPA* which is currently before the Court. *Sackett* centers on the proper legal test for determining whether the Clean Water Act 33 U.S.C. §§ 1251 *et seq.*, applies to a given wetland. If the Clean Water Act does apply to a given wetland, then the wetland’s owner must acquire a permit from the appropriate federal agency (the Environmental Protection Agency, or the Army Corps of Engineers) before discharging certain pollutants in the property.

The two proposed tests were derived from a 2006 case, *Rapanos v. United States*, 541 U.S. 738—one from the plurality and one from a concurrence. The plurality test (as advanced by the petitioner) would find Clean Water Act jurisdiction if there was a continuous surface water connection between the wetland and a traditionally navigable waterway. The respondent advanced a test derived from the concurrence which instead would find jurisdiction when there existed a “significant nexus” between the wetland and a traditionally navigable waterway. Ultimately, our simulated Supreme Court agreed with the respondent that the significant nexus test was superior.

The piece is substantially my own work, although it has received minor feedback from classmates and instructors in the simulation.

1

SACKETT v. ENVIRONMENTAL PROTECTION AGENCY

MICHAEL SACKETT, ET UX., PETITIONERS, v. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 23, 2023]

CHIEF JUSTICE WETTERHAHN delivered the opinion of the Court.

In 1972, Congress enacted the Clean Water Act (“Act”), 33 U.S.C. §§ 1251 *et seq.*, a comprehensive scheme aimed at the “[r]estoration and maintenance of the chemical, physical and biological integrity” of waters of the United States while recognizing and preserving the role of the many States in controlling aquatic pollution. Congress assigned to the Army Corps of Engineers (“Corps”) and the Environmental Protection Agency (“EPA”) the administration and enforcement of the Act not left to the States.

This case concerns the jurisdiction of the EPA to administer a permitting program for certain wetlands per the Act. These wetlands are not themselves traditionally navigable waters—that is those waters that this Court recognizes as at the core of both Federal regulatory power and at the core of the Act. Nonetheless, the health of these wetlands can, and often does, substantially affect the chemical, physical, and biological integrity of core navigable waterways.

The question before us is whether the Ninth Circuit applied the correct test to determine whether the Act covers a given wetland. The Ninth Circuit applied a test derived from a concurring opinion in *Rapanos v. United States*, 511 U.S. 738, 759 (2006) (Kennedy, J., concurring in the judgment), where a wetland is subject to the Act if it is either adjacent to or shares a “significant nexus” with a traditionally navigable water. This nexus requirement is met when a wetland significantly affects the chemical, physical, and biological integrity of that water. Because this test accords with the plain meaning of the Act’s text and congressional intent, harmonizes with our precedent, and is more administrable than the alternative, we affirm.

I

In 1996 the Corps surveyed a less than two-thirds-acre lot 300 feet north of Priest Lake in the Idaho panhandle.¹ Between the lot and Priest Lake is a gravel road and set of residential properties, while to the north of the lot lies the paved Kalispell Bay Road. On the far side of the Kalispell Bay Road (relative to

¹ All statements of fact are drawn from the Joint Appendix and the parties’ merits briefs. No. 21-454 items 21, 22, and 52.

the lot) a ditch drains the lot and the larger Kalispell Bay Fen into a creek that, in turn, empties into Priest Lake. Shallow subsurface flow connects the lot with the Kalispell Bay Fen, with which it had historically connected before the laying of the Kalispell Bay Road. The Corps concluded that the lot contained wetlands covered by the Act.

Eight years later, Michael and Chantell Sackett, unaware of the jurisdictional determination by the Corps, purchased that two-thirds-of-an-acre vacant lot 300 feet north of Priest Lake. In 2007, without seeking a permit as required for Act covered wetlands, the Sacketts dumped over two thousand tons of sand and gravel into the lot to prepare to build a house. In response to a complaint, Corps and EPA employees inspected and conducted a scientific analysis of the lot. This examination determined that the lot had the physical and biological characteristics of a wetland. These characteristics included wetland soil type, flora, and hydrology. Additionally, the EPA found that the wetland on the lot impacted Priest Lake's water quality by retaining runoff sediment, contributing to the lake's base flow, and helping with flood control. On this basis, the EPA first informed the Sacketts that the wetlands were subject to Act jurisdiction and then later issued an administrative compliance order for their unpermitted filling of the lot. This order instructed the Sacketts to remove the sand and gravel and restore the wetland to its natural status.

The Sacketts sued, eventually resulting in a 2021 decision by the Ninth Circuit Court of Appeals announcing that the Act covered the lot. *Sackett v. United States EPA*, 8 F.4th 1075 (9th Cir. 2021). In reaching its decision, the Ninth Circuit applied a test articulated by Justice Kennedy in a concurrence to a four-Justice plurality in *Rapanos*. *Id.* at 1092. This test finds Act jurisdiction over a wetland when it has a significant nexus with a “traditionally navigable water.” *Id.* at 1088. This “significant nexus” inquiry turns on “whether the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* When the court applied this test to the wetland lot owned by the Sacketts, it noted the wetland's subsurface connection with the Kalispell Bay Fen and their shared connection with Priest Lake via the drainage ditch and adjoining creek. *Id.* at 1092. On this basis, the court determined that the wetland had a significant nexus with a traditionally navigable water and thus fell under Act jurisdiction. *Id.*

II

Before the enactment of the Act, Federal regulation of waterways primarily focused on the issue of navigability in keeping with its Article I authority to regulate channels of commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *The Daniel Ball*, 77 U.S. (10 Wall) 447, 563 (1870); *United States v. Standard Oil Co.*, 384 U.S. 224, 226-28 & n.4 (1966). However, in 1972, Congress—still acting within

its Commerce Clause powers—passed the Act to “establish an all-encompassing program of water pollution regulation.” *City of Milwaukee v. Illinois*, 451 U.S. 317, 304 (1981). The Act’s express goals were to: (1) restore and maintain the “chemical, physical, and biological integrity of the Nation’s waters”; and (2) to recognize, preserve, and protect the “primary responsibilities and rights of States” to manage land and water resources. 33 U.S.C. § 1251(a), (b). As one step toward accomplishing these goals, the Act prohibited the unpermitted discharge of pollutants—including fill material like sand and rock—into “navigable waters.” 33 U.S.C. §§ 1362(6); 1362(12)(A). “[N]avigable waters,” the very core of congressional commerce regulation authority, was broadly defined as “the waters of the United States including the territorial seas.” 33 U.S.C. § 1362(7). The Act further tasked the Corps and the EPA with administering permitting regimes for different pollutants.

Initially, the EPA and the Corps took different approaches to the jurisdictional question of what qualified as “navigable waters.” Notably, the Corps adopted a narrow and restrictive definition. Per the Corps, “navigable waters” were only those waters covered by a pre-existing permitting program authorized by an earlier federal statute concerned exclusively with navigability. However, this approach did not survive judicial review and the Corps adopted a new interpretation of “navigable waters” in line with the definition adopted by the EPA and its “full regulatory mandate.” *NRDC, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C., 1975). This new approach asserted Act jurisdiction over (among others) waters including wetlands “adjacent” to traditionally navigable waters and their tributaries. 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). “Adjacent” in turn meant “bordering, contiguous, or neighboring” with both naturally occurring and manufactured barriers such as dikes or berms not defeating adjacency. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

In 1977, Congress substantially amended the Act, in part to give more responsibilities, such as administering certain pollutant permitting programs, to States and Tribes. 33 U.S.C. §§ 1342(b), 1344(g)(1), 1377(e). However, Congress did not change the definition of “navigable waters” and even explicitly affirmed that the Act covered “adjacent” wetlands. 33 U.S.C. § 1344(f)(1)(A). Congress enacted this revision of the broader Act and affirmation of adjacent wetlands coverage with full knowledge of the Corps’ regulatory definition of “adjacent,” following extensive inquiry.²

² See, e.g., *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 38-44, 68-69, 239, 325-326 (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 5-7, 10, 31 (1975).

Moreover, the very subsection of the revised Act that allowed States to issue pollutant permits for some “navigable waters” left to exclusive Federal jurisdiction permitting for other waters “including wetlands adjacent [to navigable waters].”³ 33 U.S.C. § 1344(g)(1).

After the 1977 revision, the Corps and the EPA adopted parallel regulations defining “adjacent” in the same manner as the Corps had at the time of the congressional inquiries and Act revision. The regulations remained, in the relevant parts, the same from then through the EPA’s positive jurisdictional determination of the Sackett lot. 51 Fed. Reg. 41,206, 41,206 (Nov. 13, 1986); 86 Fed. Reg. 69,372, 69,373 & n.5 (Dec. 7, 2021).

III

This Court has previously addressed Act jurisdictional questions arising from definitional disputes bordering, contiguous, or neighboring to the Corps’ and the EPA’s regulatory understanding of “adjacent.” However, these cases are not, by themselves, dispositive of the issue at the heart of this case: what test should be used to determine Act jurisdiction over a wetland.

Most recently, in *Rapanos* we considered Act jurisdiction over wetlands adjacent to certain constructed drainage ditches. A four-Justice plurality opinion authored by Justice Scalia concluded that “adjacent wetlands” in the Act meant only those wetlands with a “continuous surface connection” to traditionally navigable waters. *Rapanos*, 547 U.S. at 742. Thus, human-made barriers, such as paved roads interrupt adjacency and remove wetlands from the scope of the Act. *Id.*

Justice Kennedy wrote a lone concurrence applying a different test; the Act covered adjacent wetlands that had a “significant nexus” to traditional waters. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Under this significant nexus test, a wetland “possesses the requisite nexus and thus come within the statutory phrase ‘navigable waters,’ if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780.

³ “The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into **the navigable waters (other than those waters** which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, **including wetlands adjacent thereto**).” 33 U.S.C. § 1344(g)(1) (emphasis added).

Because of the fractured judgement in *Rapanos*, the case lacks binding precedential authority for our central issue. To put a finer point on it: we must decide whether the plurality or Justice Kennedy’s concurrence provides the right rule for Act jurisdictional determinations over wetlands.

Other cases mark the factual extremes of Act jurisdiction. *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985) provides an edge case where there is certainly Federal jurisdiction. On the other hand, *Solid Waste Agency of North Cook County v. United States Army Corps* (“SWANCC”), 531 U.S. 159 (2001), provides an edge case where the Act certainly does not allow Federal jurisdiction. Although the facts and specific holdings of these cases are not dispositive, their frameworks—particularly *Riverside Bayview*’s—can help us resolve this case.

In *Riverside Bayview*, this Court was presented with the question of whether the Corps’ (and by implication the EPA’s parallel) regulation of a wetland directly abutting a traditional navigable water was permissible under the Act. 474 U.S. at 121. There, the Corps had judged a wetland to be adjacent to a navigable water (and thus under Act jurisdiction) where “one could, after wading through a cattail marsh, swim directly from [that particular wetland] to the Great Lakes.” Reply Brief for the United States *United States v. Riverside Bayview Homes, Inc.*, at 2, No. 84-701, 1985 WL 669804 (1985). We unanimously upheld the Corps’ jurisdictional determination. *Riverside Bayview*, 474 U.S. at 139. In our analysis we considered the “language, policies, and history” of the Act. *Id.*

Beginning with the language, we acknowledged the although the word “wetlands” does contain “land,” it would be too simplistic to consider wetlands to be indistinct from “dry lands” (and thus beyond the scope of the Act) based on this linguistic quirk. *Riverside Bayview*, 474 U.S. at 132. “Wetlands” instead fell into the transitional category between land and water, where the Corps (and EPA) would be required to make a jurisdictional judgment call. *Id.* Further, 33 U.S.C. § 1344(g)(1) provided direct support in the text of the statute for the inclusion of wetlands under the Act’s scope of “waters of the United States.” *Id.* at 138.

Turning to the policies and history of the Act, we acknowledged the importance of Federal jurisdiction over adjacent wetlands in “reasonable proximity to other waters of the United States” because of their necessary role as part of the “aquatic system” in maintaining the chemical, physical, and biological integrity of our waters. *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. at 37,128). We further observed that Congress had the scope of the Corps’ jurisdiction “specifically brought to [its] attention” before amending the Act in 1977. *Id.* at 137. After this, Congress not only refused to diminish the Corps’ jurisdiction over adjacent wetlands, it even expressly incorporated “adjacent wetlands” into the term “navigable waters” in 33 U.S.C. § 1344(g)(1). *Id.* at 137, 138. Accordingly, citing *Chevron, U.S.A., Inc.*

v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984), we determined that the Corps had used its specialized knowledge to reasonably construe and apply “adjacent wetlands” and deferred to its judgment. *Id.* at 131.

In *SWANCC*, we addressed whether the Corps had properly exercised Act jurisdiction over outlying ponds visited by migratory birds. 531 U.S. at 159. There, we declined to uphold the Corps’ jurisdictional determination because the outlying ponds lacked a “significant nexus” to waters of the United States as traditionally understood, underscoring their geographic remoteness. *Id.* at 167.

IV

In this case, we must decide if the Ninth Circuit applied the correct test when it determined that the wetland lot owned by the Sacketts north of Priest Lake was covered by the Act. We conclude that it did.

The core of this case is the choice between the two conflicting understandings of Act coverage for adjacent wetlands expressed in *Rapanos*. The Sacketts urge we adopt the plurality’s “continuous surface connection” test, while the EPA suggests that the significant nexus test from Justice Kennedy’s concurrence is the law.

The correct test is the significant nexus test. The significant nexus test accords with the text, policies, and history of the Act; our precedent; and in its administration avoids pitfalls the continuous surface connection test does not.

A

To begin, the significant nexus test directly addresses the primary black letter statutory goal of the Act: restoring and maintaining the “chemical, physical, and biological integrity” of American waters. 33 U.S.C. § 1251(a). The criteria for finding a significant nexus exactly match this goal. That is, a given adjacent wetland is under Act jurisdiction if it significantly affects the “chemical, physical, and biological integrity” of the core waters of congressional concern, *i.e.*, navigable waters. *Rapanos*, 547 U.S. at 759. The direct textual pedigree from the stated goals of the Act ensures that the significant nexus test does not undercut or frustrate the policies the Act was intended to effectuate, which are—at risk of redundancy—safeguarding the chemical, physical, and biological integrity of American waters.

This is in contrast to the continuous surface connection test, whose textual origin is murky and whose application would mire enforcement of the Act in a muck of conflicting State and Tribal rules. To locate the continuous surface connection test in the text of the act requires either ignoring the textual inclusion of “adjacent wetlands” in “navigable waters” found in 33 U.S.C. § 1344(g)(1) or ignoring the dictionary and common, everyday understanding of the word “adjacent.”

The text of the statute identifies “adjacent wetlands” as a subset of “navigable waters” and thus waters of the United States and therefore under Act jurisdiction. 33 U.S.C. § 1344(g)(1). The Sacketts argue as a matter of statutory interpretation that parentheticals in statutes are intended to convey afterthoughts or less important terms. Therefore, because “adjacent wetlands” appears as part of a long parenthetical, Congress could not have intended the phrase to carry the semantic weight placed on it by the EPA. This argument appears to be an attempt to apply so-called “no-elephants-in-mouseholes” canon of statutory interpretation, which articulates that Congress does not “typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). However, the “no-elephants-in-mouseholes” canon is inapposite here. First, there is no elephant. The Act is a comprehensive statutory scheme explicitly aimed at protecting the integrity of American waters. It is not a radical or fundamental expansion of Federal jurisdiction to extend agency pollution permitting schemes to wetlands which, necessarily under the significant nexus test, significantly impact the integrity of core national waters. Second, there is no mousehole. The text in question, although it does straddle a parenthetical, comes directly from a subsection dealing explicitly with the respective responsibilities of Federal agencies and States. 33 U.S.C. § 1344(g)(1). It would be very strange to suggest, as this argument seems to, that Congress accidentally overexpanded Federal power at the expense of the many States in the same provision where it empowered State pollution permitting regimes. Moreover, this subsection was amended into the Act after Congress had conducted extensive investigation of the Corps’ administration of its pre-1977 permitting program. If Congress had intended to prevent the Corps (or EPA) from exercising jurisdiction over wetlands adjacent to traditionally navigable waters, it could have done so. Instead, it explicitly confirmed that the Corps’ permitting program applied to “adjacent wetlands” as a subset of “navigable waters.” *Id.* Thus, the Act unambiguously confirms EPA jurisdiction over “adjacent wetlands.”

For the continuous surface connection test—which requires wetlands to have a continuous surface water connection to traditionally navigable waterways—to be congruent with the text Act, “adjacent” must narrowly mean contiguous or abutting. However, this is not the case. Neither the dictionary definition nor the everyday plain meaning of “adjacent” are constrained to just contiguous or abutting. *Black’s Law Dictionary* takes “adjacent” to mean “[l]ying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, **though they may not actually touch.**” *Black’s Law Dictionary* 62 (rev. 4th ed. 1968) (cleaned up emphases changed).⁴ The everyday use of “adjacent” is similarly unconstrained. No one would misunderstand, or even find odd, a speaker saying

⁴ See also, *The American Heritage Dictionary of the English Language* 16 (1975) (“Close to; next to; lying near; adjoining.”); *Webster’s New International Dictionary of the English Language* 32 (2d ed. 1958) (“Lying near, close, or contiguous; neighboring; bordering on.”) (emphasis omitted).

they grew up in an apartment building adjacent to their best friend's building when the two buildings were on opposite sides of a street or were divided by an alley. Thus, the continuous surface connection test does not accord with either the text of the Act or with the plain meaning of "adjacent."

The Sacketts also argue that federalism concerns should restrain the application of the Act to only those wetlands with a continuous surface water connection to traditionally navigable waterways. These concerns are misplaced. The Act takes great care to respect the traditional spheres of States and Tribes in pollution regulation; it is its second stated goal of the legislation. 33 U.S.C. § 1251(b). Congress achieved this goal by, among other mechanisms, assigning permitting responsibilities of some wetlands to States in the same section of the Act where it assigned to a Federal agency jurisdiction over "adjacent wetlands." 33 U.S.C. § 1344. Nor does the significant nexus test in itself extend congressional power unconstitutionally. In addition to the built in federalism guardrails of the Act (the second statutory goal and the State permitting programs), the significant nexus test restricts Federal jurisdiction to wetlands where there is a significant Federal interest by design. That is, it restricts jurisdiction to wetlands only if they significantly affect the waters over which Congress has unquestioned Article I authority: the very channels of interstate commerce, navigable waters. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558 (1995); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

Finally, concern that certain language in the significant nexus test invites overreach is misplaced. The test provides that the wetlands must have a significant effect "either alone or in combination with similarly situated lands in the region." This language, properly understood, simply prevents wetlands that lack any nexus with a traditionally navigable water to be lumped in with wetlands that do possess the requisite nexus. This part of the test merely ensures that the Act is comprehensively administered. Without it, a jurisdictional gap could emerge, with Federal permitting programs excluding small lots with meaningful connections to traditionally navigable waters. These small lots by definition do not in themselves *significantly* affect navigable waters because of their size, but nonetheless are within the proper scope of the Act. In other words, each piece of a wetland must itself have a meaningful effect on a traditionally navigable water, even if that effect is not in magnitude significant until considered as part of a wetlands feature as a whole.

B

The significant nexus test harmonizes with our existing precedent in both *Riverside Bayview* and *SWANCC*.

Although it is true that both proposed tests would result in the same holding in *Riverside Bayview*, the significant nexus test better matches the methodology we used to get there. We unanimously upheld

the jurisdictional determination there not by engaging in simple surface tracing but instead by examining the “language, policies, and history” of the Act. *Riverside Bayview*, 474 U.S. at 139. This process turned on an understanding that to effectuate the goals of the Act—chiefly restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters—Congress necessarily authorized the regulation of at least some non-dry-land, non-traditionally-navigable-water natural features, such as wetlands, by administering agencies. *Id.* at 134. This was because of the significant impact that those features, including wetlands, have on the integrity of the broader “aquatic system.” *Id.* Thus, our method matched the analysis required by the significant nexus test; we found a neighboring wetland to be under Act jurisdiction precisely because of its import to other waters and its importance in the broader statutory scheme.

SWANCC is also best explained by the significant nexus test. Isolated ponds do not significantly impact traditional navigable waters just because they both may be visited by migratory birds. Our analysis explicitly addressed the importance of finding a “significant nexus” between a wetland and a traditionally understood water of the United States. *SWANCC*, 531 U.S. at 167. Because the outlying ponds were geographically remote, they lacked a significant impact on the chemical, physical, and biological integrity of waters traditionally understood to be navigable—the waters of the United States. Although it is true that the continuous surface connection test would reach the same holding, once again, our reasoning maps to the significant nexus test.

C

Finally, the significant nexus test is better in function than the continuous surface connection test. Determining which wetlands might affect the integrity of the waters of the United States will be a gritty, fact intensive inquiry best handled by agencies with specialized scientific and technical knowledge. Judges are not well positioned to second guess these decisions and should not resort to arbitrary line drawing to do so. *See Chevron*, 467 U.S. at 837. Nor is the complexity or factor-driven character of the test a barrier to its smooth implementation. The EPA and the Corps have successfully operated with regulations consistent with the significant nexus test for 45 years. Moreover, we recently upheld a similarly sophisticated factor test in the context of the Act in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). We trust both executive agencies and Federal judges to apply the significant nexus test fairly and competently.

To hold otherwise would invite counterintuitive jurisdictional conclusions and potentially undermine the ability of the Act to comprehensively regulate pollution of the nation’s waters. For instance, under the continuous surface connection test, a wetland separated from the Mississippi river by a human erected levee or raised highway would no longer be under Act jurisdiction. This would mean that Federal agencies like the EPA would be helpless to prevent despoilment of such a wetland despite full knowledge

that it and the Mississippi could be extensively connected by subsurface flow, or that its infill would harm the ability of the Mississippi to withstand flood pressures. This would discourage Federal waterway management for fear of cutting off their own jurisdiction. For example, if the Corps sees that a levee is needed for flood control reasons between a continuously-surface-connected wetland and a traditionally navigable water it would face a dilemma. Either it must not build the levee or it must surrender its power to protect the integrity of a core water of the United States through preventing the infill and pollution of the wetland. Or, to take another example, a continuous surface water connection between a wetland and a navigable water could be present all but two weeks out of the year but naturally disappear because of lowered water levels during the height of summer. It is clear under the significant nexus test whether and when the EPA has jurisdiction, but under the continuous surface connection test it is not. The significant nexus test handles cases easily where the continuous surface connection test just gets stuck in the mud.

Nor does the complexity of the test present a potential pitfall to innocent-minded property owners. First, the Corps will provide a jurisdictional determination to a property owner for free. Second, a positive jurisdictional determination only means that a given lot is subject to Federal permitting, not that it is necessarily a no-build site. If a property owner is dissatisfied with either a jurisdictional determination or a permitting decision, they can use the internal appeal mechanisms of the permitting agencies to seek a different outcome.

V

The Ninth Circuit was right to apply the significant nexus test to the wetland lot in this case. The significant nexus test is the correct statement of the law and the Ninth Circuit correctly applied the test to the facts of this case. The record showed that the wetland lot and the larger Kalispell Bay Fen drained via subsurface flow north of Kalispell Bay Road into a creek emptying into Priest Lake. Thus, the lot had adjacency to a navigable water (Priest Lake) via the creek's tributary. The presence of an artificial barrier such as the Kalispell Bay Road did not defeat adjacency. Further, due to its role in retaining runoff sediment, helping with flood control, and contributing to Priest Lake's base flow; the wetland had a significant effect on the chemical, physical, and biological integrity of a traditionally navigable waterway. The lot therefore was adjacent to and had a significant chemical, physical, and biological effect on traditionally navigable water. This was sufficient to establish the requisite significant nexus. Thus, the EPA had jurisdiction per the Act over the Sackett's wetland lot.

We therefore *affirm* the judgment of the Court of Appeals.

JUSTICE ----- took no part in the consideration or decision of this case.

Applicant Details

First Name **Emma**
Last Name **Wexler**
Citizenship Status **U. S. Citizen**
Email Address wexler2024@lawnet.ucla.edu
Address

Address
Street
71 Hancock st
City
San Francisco
State/Territory
California
Zip
94114
Country
United States

Contact Phone Number **4156806602**

Applicant Education

BA/BS From **Brown University**
Date of BA/BS **December 2018**
JD/LLB From **University of California at Los Angeles (UCLA) Law School**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011
Date of JD/LLB **May 14, 2024**
Class Rank **Not yet ranked**
Law Review/Journal **Yes**
Journal(s) **Journal of Law and Technology**
Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Malloy, Timothy
Malloy@law.ucla.edu
(310) 794-5278
Horwitz, Jill
horwitz@law.ucla.edu
Wetzstein, Sarah
wetzstein@law.ucla.edu
310 206-1093

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emma Ackerman Wexler

415.680.6602 | wexler2024@lawnet.ucla.edu | 71 Hancock Street, San Francisco, CA 94114

June 5, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Re: Judicial Clerkship Application

Dear Judge Walker:

I am a rising third-year law student at UCLA School of Law and I would be honored to clerk in your chambers starting fall of 2024. Last summer, I enjoyed my judicial externship at the U.S. District Court for the Northern District of California and would like to build upon this experience as a judicial clerk. I believe a judicial clerkship will be a meaningful way to begin a career of public service working for the federal government. I am interested in spending time in Norfolk, Virginia because I would like to experience a different part of the country and explore the coast and nature in the surrounding area.

Going into law school, I knew that I wanted to work in policy, lawmaking, or government after graduation. During my summer judicial externship in the U.S. District Court for the Northern District of California, I gained a deeper appreciation for federal law and found it compelling to see the impact the judicial system could have in administering justice. While drafting bench memoranda for the court, I strengthened the legal research and writing skills. Judge Corley's clerks commended my ability to draft a coherent bench memorandum based on the judge's initial impressions of the case, and Judge Corley even told me that my written work product was of the highest quality and ranked in the top percentage of her previous summer externs.

Not only did I succeed at my judicial externship last summer, but I thoroughly enjoyed researching complex topics and analyzing how to best apply the law to a specific case. I have always thrived in a problem-solving setting. Analytical thinking was also my favorite part of my previous job in market research consulting and my Behavioral Decision Sciences major at Brown University. I am excited by the opportunity to be your law clerk because I will be able to learn more about the law through creative and analytical thinking while participating in the interaction between the law and the public.

This year, inspired by my Administrative Law, Public Health Law, and Environmental Aspects of Business Transactions courses, I solidified my interest in working in a federal government agency. I have further practiced and sharpened my writing skills as an Articles Editor on the Journal of Law and Technology. Additionally, I am honing my professional legal skillset this summer at a Summer Associate at Wilson Sonsini Goodrich & Rosati. I believe that clerking will be the perfect opportunity to gain exposure to federal law, experience working for the U.S. Government, and demonstrate my commitment to public service.

In sum, I believe that I possess the necessary skills to successfully assist you as a law clerk. Enclosed please find a copy of my resume, transcript, writing sample, and letters of recommendation from Professor Wetzstein, Professor Malloy, and Professor Horwitz for your review. I appreciate your consideration for this clerkship and look forward to hearing from you soon.

Sincerely,



Emma Wexler

Emma Ackerman Wexler

415.680.6602 | wexler2024@lawnet.ucla.edu
71 Hancock Street, San Francisco, CA 94114

EDUCATION

UCLA School of Law, Los Angeles, CA
J.D. Candidate, May 2024

GPA: 3.59
Honors: Masin Family Academic Excellence Gold Award in Nonprofit Law and Policy
Battle for the Gavel Soccer Champion Against USC Law
Activities: Journal of Law and Technology, *Chief Articles Editor*
Health Law Society, *Board Member*
El Centro Education Rights Clinic, *Volunteer*; If/When/How, *Member*

Brown University, Providence, RI
B.A. in Behavioral Decision Sciences, December 2018

Leadership: Behavioral Decision Sciences Department Undergraduate Group, *Co-President & Co-Founder*
Brown Women’s Club Soccer, *Captain*
ENGN0090 Management of Industrial and Non-profit Organizations, *Teaching Assistant*
Capstone: *Who at Brown University Feels Qualified to Run for Office? Discovering a Gender Gap*
Study Abroad: Vesalius College, Brussels, Belgium, Fall 2016

EXPERIENCE

Wilson Sonsini Goodrich & Rosati, San Francisco, CA May 2023 – July 2023
Summer Associate

United States District Court for the Northern District of California, San Francisco, CA May 2022 – July 2022
Judicial Extern to Judge Jacqueline S. Corley

- Performed legal research and drafted bench memoranda on topics including a motion to vacate, a subpoena request, a motion to dismiss, and an appointment of a legal guardian
- Observed district court trials, pre-trial hearings, and motions and discussed observations with the Judge

Lieberman Research Worldwide, Los Angeles, CA March 2019 – June 2021
Research Manager, November 2020 – June 2021
Research Associate, March 2019 – April 2020

- Managed execution of quantitative and qualitative studies by creating project timelines, writing questionnaires, overseeing data collection, analyzing data tables, and creating final report deliverables for clients
- Leveraged advanced analytic tools and research to provide solutions to clients' key business questions
- Managed accounts and financials to ensure clients were satisfied within the scope of projects

Dave Fromer Soccer, Mill Valley, CA October 2020 – January 2021
Soccer Coach

- Led practices twice a week to teach children basic soccer skills and fitness
- Engaged in teambuilding games to inspire children’s love for physical activity

SKILLS & INTERESTS

Technical Skills: Westlaw, LexisNexis, Python, SPSS, Qualtrics, Salesforce, Advanced Microsoft Excel
Certificate: IBM Professional Certificate in Data Science
Interests: Political podcasts | Soccer | Coffee tasting | Teaching math

University of California, Los Angeles
LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: WEXLER, EMMA A
UCLA ID: 105713593
Date of Birth: 01/27/XXXX
Version: 08/2014 | SAITONE
Generation Date: June 02, 2023 | 04:34:58 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021
SCHOOL OF LAW
Major:
LAW

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

PR COMPLETED IN LAW 312, 22F

Previous Degrees

None Reported

California Residence Status

Resident

Student Copy / Personal Use Only | [105713593] [WEXLER, EMMA]

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	14.8	A-
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
PROPERTY	LAW 130	4.0	13.2	B+
CIVIL PROCEDURE	LAW 145	4.0	12.0	B
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>
	Term Total	13.0	13.0	40.0
				<u>GPA</u>
				3.333

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	18.5	A-
End of Multiple Term Course				
CRIMINAL LAW	LAW 120	4.0	13.2	B+
TORTS	LAW 140	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	13.2	B+
LGBT LAW AND POLICY	LAW 165	1.0	0.0	P
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>
	Term Total	18.0	18.0	59.7
				<u>GPA</u>
				3.512

Fall Semester 2022

BUSINESS ASSOCIATNS	LAW 230	4.0	13.2	B+
PROFESSIONAL RESPON	LAW 312	2.0	6.6	B+
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
NONPROFIT LAW & POL	LAW 363	4.0	17.2	A+
INTL COMPRTV SPORTS	LAW 432	3.0	12.0	A
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>
	Term Total	14.0	14.0	49.0
				<u>GPA</u>
				3.769

Student Copy / Personal Use Only | [105713593] [WEXLER, EMMA]

Spring Semester 2023

ADMINISTRATIVE LAW	LAW 216	3.0	9.9	B+
INTRO FED INCOME TX	LAW 220	4.0	16.0	A
PUBLIC HLTH LW & POL	LAW 442	3.0	9.9	B+
HLTH SCHOLAR WRKSHP	LAW 512	1.0	4.0	A
ENVIRON BUS TRANS	LAW 741	4.0	16.0	A
CYBERSECURITY	LAW 962	1.0	3.7	A-

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total	16.0	16.0	59.5	3.719

LAW Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Pass/Unsatisfactory Total	3.0	3.0	N/a	N/a
Graded Total	58.0	58.0	N/a	N/a
Cumulative Total	61.0	61.0	208.2	3.590
Total Completed Units	61.0			

Memorandum

Masin Family Academic Gold Award
NONPROFIT LAW & POL, s. 1, 22F

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

TIMOTHY F. MALLOY
PROFESSOR OF LAW
FACULTY DIRECTOR, UCLA SUSTAINABLE TECHNOLOGY AND POLICY PROGRAM

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 794-5278
Email: Malloy@law.ucla.edu

The Honorable «Full_Name»
«Court_General»
«Court_Specific»
«Street1»
«Street2»
«Street3»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

I am writing with respect to Emma Wexler, who is applying to you for a clerkship position. Ms. Wexler has been in two of my classes at UCLA. In the Fall of 2021 semester, she was in my Contracts class. That class was relatively small for a first year doctrinal course—about forty people. My Environmental Aspects of Business Transactions class, which she took in Spring of 2023, had an enrollment of sixteen second- and third-year law students, providing me an even greater opportunity to get to know her well. Based on my experiences in those classes, I recommend her to you enthusiastically.

Ms. Wexler is a very strong student. She received an A- in Contracts and an A in Environmental Business Transactions. In addition to her capacity for careful, critical thought, she has the ability to keep an eye on the practical implications of her arguments. My Contracts class covers common law, statutory law in the form of the Uniform Commercial Code (UCC), and policy. It is an intense class, with heavy focus on classroom interaction and on-the-ground application of law and policy. Our exploration of the UCC is particularly challenging for many students. Ms. Wexler was an active participant in class, well prepared whether she volunteered or I “cold-called” her. I look for several things in students, including strong understanding of the doctrines, capacity to deal with uncertainty and ambiguity in the law and the facts, and the ability to deal with underlying policy issues. She exhibited remarkable proficiency in each and was undaunted by the complexities of the UCC.

My Environmental Aspects of Business Transactions class uses an extensive, semester long, complex simulation of the sale of a chemical plant to teach transactional strategies and skills. This “experiential” course introduces students to sophisticated lawyering in the transactional context. The course is designed to engage students at the doctrinal, practical, and strategic levels. The class size allowed me to meet individually with each student regularly throughout the semester to discuss written assignments performed as part of the class. I also watch and critique videos of two two-hour negotiation sessions of each student over the course of the semester. Ms. Wexler’s performance in the business transactions course was absolutely terrific. She excelled in a variety of skills, including technical drafting, oral communication, and

The Honorable «Full_Name»

May 9, 2023

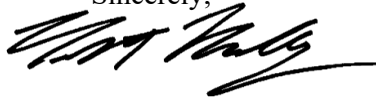
Page 2

strategic analysis. She also collaborated well with a variety of negotiation partners and engaged thoughtfully and enthusiastically in our in-class discussions regarding ethics, negotiation theory, and substantive environmental law and regulation.

From my interactions with Ms. Wexler, she has the intellectual capacity and commitment needed to excel as a law clerk. From my discussions with her outside of class, I believe that her background and experience will enable her to manage challenging workloads and engage with and communicate difficult concepts and analyses. Her writing, which I saw extensively in both courses, is top-notch, whether drafting an objective legal memorandum, a client letter, or an indemnification. Having clerked myself (albeit some years ago) I understand what is required of judicial law clerks, and I am confident that she has the ability and the desire to be a terrific one.

If you have any questions, please do not hesitate to contact me via e-mail at malloy@law.ucla.edu.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy F. Malloy', with a stylized, flowing script.

Timothy F. Malloy

UCLA School of Law

JILL R. HORWITZ, PH.D., J.D., M.P.P.
DAVID SANDERS PROFESSOR OF LAW AND MEDICINE
FACULTY DIRECTOR, PROGRAM IN PHILANTHROPY AND NONPROFITS

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1577
Email: horwitz@law.ucla.edu

May 12, 2023

The Honorable «Full_Name»
«Court_General»
«Court_Specific»
«Street1»
«Street2»
«Street3»
«City», «State» «Zip»

Dear «Salutation» «Last_Name»:

I am writing to recommend Ms. Emma Wexler for a clerkship in your chambers. In short, Emma is a serious thinker, an extremely hard worker, and a delightful person. I recommend her enthusiastically.

I have had the pleasure of teaching Emma in two courses. First, she was a student in my Nonprofit Law and Policy course last semester, Fall 2022. The course covers a wide range of material, including both substantive state statutory and common law as well as the tax law of exempt organizations. At the start of the course, it was easy to overlook Emma because she was relatively quiet. Occasionally she would raise her hand, but in a class of quite vocal students she would mostly wait to be called on. After the first few weeks, however, Emma stood out. The students must complete a range of assignments during the course, written and oral. Her written work, largely in the form of short essays, put her at the very top of the class. They were not only the most sophisticated papers in terms of argument, but they were beautifully written. In addition, given Emma's contributions I began to call on her to answer particularly difficult questions. Her answers revealed not only that she had understood the material, but that she had thoroughly prepared and thought about the material in context, so much so that she must have performed even further research on the questions we were discussing. I seldom give an A+ in an upper-level course. Hers was well deserved.

Second, Emma was a student in my health law workshop this semester, Spring 2023. The course is unconventional for a law school class. Over the semester, several scholars present unpublished works in progress. The students prepare for those sessions by reading related scholarship, presenting the faculty presenter's work in class the week before the workshop, and leading discussions. They then write referee reports on the presenter's draft. Every piece of her work was extremely insightful and polished. It was her engagement with the faculty speakers, however, that made her stand out. She offered fully professional comments on every single paper,

Emma Wexler, Page 2

including a quantitative paper by an economist writing about a legal issue. She made her comments respectfully and with quiet authority. Each speaker noticed.

A final sign of my high regard for Emma is that I have asked her to serve as a Research Assistant next year on a funded research project. Most of our students researchers work for professors under the supervision of a librarian. In this case, Emma will be working directly for me. She is smart, resourceful, and responsible enough to do the work with little supervision.

Finally, Emma's transcript is just fine, but not at the top of the class. I think she struggled to get her footing in law school, particularly early on. She is also not competitive. Whereas a student of her talents would study only with the highest achieving students, I have seen Emma tutor classmates who struggle. She is kind and generous.

I hope you will give Emma the opportunity to work for you. Please contact me if I can supply any more information to assist her candidacy.

Very truly yours,



Jill R. Horwitz



SARAH R. WETZSTEIN
LECTURER IN LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-1093
Email: wetzstein@law.ucla.edu

June 3, 2023

Dear Judge:

I am writing to highly recommend Emma Wexler for a clerkship in your chambers. Emma was a student in my Legal Research and Writing class at the UCLA School of Law during her first year of law school, and I had the pleasure of getting to know her in that context.

At UCLA Law, Legal Research and Writing is a demanding, year-long, five-credit course. When Emma was in my class, my students completed three ungraded writing assignments, five ungraded research assignments, two graded writing assignments (one objective and one persuasive), and one graded research assignment. I also required my students to participate in numerous ungraded exercises. My evaluation of Emma is based on her performance on written assignments, her participation in class discussions and on exercises, and my individual meetings with her.

Emma was a strong Legal Research and Writing student from the start. She arrived at law school with excellent writing skills and, unlike many students, made the transition to legal writing smoothly. Legal analysis seems to come naturally to Emma, who reads carefully and thinks analytically. She is also a skilled and thorough researcher who enjoys the problem-solving aspect of legal research.

As a results of these skills and others, Emma turned in high-quality, polished work all year. Her fall graded writing assignment—an objective memo relating to the potential misappropriation of an alleged trade secret—was a particular highlight as she received the second highest score in her section of 25 students.

Additionally, Emma was a positive member of our classroom community. She set a good example for others by coming to class on time and prepared and by participating appropriately in class discussions and exercises. Emma worked well in groups and seemed to be well-liked by her peers.

She also attended office hours regularly, sometimes to dig more deeply into material we covered in class or to ask questions about an assignment and other times to talk through career related questions. I enjoyed engaging with Emma in this way and was impressed with her thoughtful and deliberate approach to both her work for our class and her career planning.

Emma stayed in touch after our class ended. Among other things, we discussed her summer job interview process and opportunities, her 2L classes, and her career related plans and goals. When Emma began to consider seeking a clerkship, I encouraged her to apply not only because I believe clerking would be a great experience for Emma, but also because I am confident that Emma would be a terrific clerk. The same traits and skills that have served Emma well as a law student will also serve her well as a clerk. She is intelligent, hard-working, steady, and mature.

June 3, 2023

Page 2

If I can provide any additional information about Emma as you consider which candidates to interview and hire, please do not hesitate to ask. As I hope I have made clear, I believe that Emma would be a fantastic choice.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah R. Wetzstein", with a long horizontal flourish extending to the right.

Sarah R. Wetzstein
Lecturer in Law
UCLA School of Law

Emma Wexler
71 Hancock Street
San Francisco, CA 94114
wexler2024@lawnet.ucla.edu
(415) 680-6602

Writing Sample

I drafted the following memorandum as an extern for Judge Jaqueline Corley in the Northern District of California. The memorandum references a case that was transferred from the Western District of Texas to Judge Corley. In the document, I recommend that Judge Corley deny a motion to vacate the transfer order in part.

The memorandum represents substantially my own work with some editing by my law clerk supervisor. Judge Corley gave me permission to use this writing sample.

MEMORANDUM

To: Judge Corley
From: Emma Wexler
Date: May 27, 2023
Re: Motion to Vacate in Part
Recommendation: DENY

Defendant seeks to vacate in part an order transferring this case to the Northern District of California. (Dkt. No. 97.) Plaintiff filed a complaint against Defendant in the Western District of Texas (“WDTX”) for patent infringement. (Dkt. No. 1.) The court granted Defendant’s motion to transfer to this District. (Dkt. No. 82.) The Transfer Order included a credibility finding about Defendant’s declarant. (*Id.*) Defendant does not contest the transfer but seeks to vacate the portion of the Transfer Order which included the credibility finding. (Dkt. No. 97.) I recommend you DENY Defendant’s motion to vacate in part.

BACKGROUND

Plaintiff sued Defendant in the WDTX for patent infringement. (Dkt. No. 1.) Defendant filed a motion to transfer to this District for convenience under 28 U.S.C. § 1404(a). (Dkt. No. 37.) In support of its motion, Defendant filed a declaration by Defendant’s Finance Director which stated that relevant witnesses reside in the Northern District of California; San Diego, CA; and Auckland, New Zealand. (*Id.*; Dkt. No. 82.) Plaintiff opposed the motion and identified other potential witnesses located in Austin, TX, and other locations outside of California or Texas. (Dkt. No. 67.; Dkt. No. 82.) In response, Defendant submitted a second declaration by the Finance Director in which he refuted Plaintiff’s statements about potential Texas witnesses. (Dkt. No. 72; Dkt. No. 82.)

The transfer court found the convenience transfer factors weighed in favor of transfer to the Northern District of California and granted Defendant’s motion. (Dkt. No. 82.) However, the Transfer Order also included a finding that Defendant’s declarant lacked credibility. (*Id.* at 3.)

Because both motions were filed under seal, the transfer court issued its order under seal and allowed the parties one week to submit redactions. (Dkt. No. 97 at 11.) The parties jointly asked for an eight-day extension which the court denied. (*Id.*) Defendant filed its proposed redactions seeking to redact the WDTX Court's unwarranted and false statements about the declarant and one item of confidential business information. (Dkt. No. 80-1.) At the same time, Defendant filed a motion to seal the Transfer Order to prevent irreparable harm to Defendant and the declarant from the WDTX Court's false statements. (Dkt. No. 83.) Defendant requested full briefing on the matter and asked to keep the material under seal pending resolution of the motion to seal (and any subsequent appeal). (*Id.*) The transfer court denied Defendant's motion to seal without a hearing and published the order with the credibility finding and only one piece of business information redacted. (Dkt. No. 82)

Defendant filed a motion to vacate in part the Transfer Order, which is now before this Court. (Dkt No. 97.) Specifically, Defendant seeks to vacate the finding on the declarant's credibility. (*Id.*) Plaintiff filed an opposition to which Defendant replied. (Dkt. No. 106; Dkt. No. 108.)

LEGAL STANDARD

A district court in its discretion may revisit prior interlocutory decisions entered by another judge in the same case for cogent reasons or in exceptional circumstances. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532-33 (9th Cir. 2000). Such circumstances occur because "ultimately the judge who enters the final judgment in the case is responsible for the legal sufficiency of the ruling and is the one that will be reversed on appeal if the ruling is found to be erroneous." *Id.* at 530. A cogent reason or exceptional circumstance can occur where the second judge believes a decision by a judge in an earlier order is legally improper or that error in a previous decision would cause a useless trial. *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 380 (9th Cir. 1960). Though this framework applies to interlocutory orders after transfer, courts have employed it when considering a challenge to a Transfer Order, but as far as

I am aware none have found exceptional circumstances for doing so. *See Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, No. 20-CV-709 JLS (JLB), 2021 WL 230029, at *6 (S.D. Cal. Jan. 22, 2021) (collecting cases).

DISCUSSION

Defendant asks this Court to exercise its discretion and revisit the Transfer Order. However, this Court should not do so. First, Defendant's motion is procedurally improper because: (1) there is no legal support for vacating part of the Transfer Order; and (2) Defendant's objection to the Transfer Order is not something that Defendant could raise on appeal. Second, this case is not an exceptional circumstance in which a court should revisit a prior interlocutory order.

A. Defendant's Motion is Procedurally Improper

As a threshold matter, Defendant's motion to vacate an order on a motion for which it was the prevailing party because it disagrees with some of the conclusions is procedurally improper. First, the Court cannot vacate just a part of the reasoning on an order. And second, Defendant cannot appeal the Transfer Order.

1. No Legal Basis to Vacate Dicta

Defendant seeks to vacate the part of the Transfer Order which finds the declarant lacks credibility. (Dkt. No. 97.) To do so, Defendant treats the credibility finding as separate from the ultimate holding to transfer. (Dkt. No. 108 at 8.) However, Defendant provides no legal support for its argument that the credibility finding is a separate legal judgment. Instead, Defendant encourages an inference that because the credibility finding played almost no role in the substantive analysis, it is a separate finding. For example, Defendant contends "the credibility finding played almost no role in the substantive transfer analysis and, in fact, contravened the ultimate outcome... the Transfer Order would have come out in [Defendant's] favor with or without the credibility finding." (Dkt. No. 97 at 17-8.)

The credibility finding, however, is not a legal judgment, but rather dicta. Though the credibility finding had minimal influence on the analysis, it was still part of the court's

reasoning. The transfer court used the credibility finding as support for the choice to “credit [the defendant’s] declaration only for its un rebutted statements.” (Dkt. No. 82 at 3.) Thus, though the credibility finding is dicta since the transfer court would have decided to transfer without it, the credibility finding is still a part of the reasoning in the order and not a separate finding. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (defining a statement as “dictum” where it is made during the course of delivering a judicial opinion but is unnecessary to the decision in the case and is therefore not precedential.)

Defendant provides no legal support for its argument that the Court can vacate reasoning in a decision but leave the ultimate holding intact. However, though this Court cannot vacate the credibility finding, it is under no obligation to credit the finding as true and should not do so.

2. The Credibility Finding Is Non-Appealable

Defendant cannot appeal the Transfer Order at this time. An order to transfer is an interlocutory order which is not appealable prior to final judgment. *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968). Thus, because the credibility finding is part of the Transfer Order, Defendant cannot appeal the order prior to final judgment.

Defendant cannot appeal even after final judgment. A party may not appeal from a judgment in its favor for the purposes of obtaining review of findings which are immaterial to the disposition of the case. *Envtl. Prot. Info. Center, Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). Here, the Transfer Order found in Defendant’s favor, but Defendant still seeks review of the credibility finding. To vacate the credibility finding is more like performing a line edit of the Transfer Order than reviewing a case on the merits. *See Melendres v. Maricopa Cnty.*, No. 16–16659, 2017 WL 4317167 at *1 (9th Cir. July 27, 2017) (holding the Ninth Circuit will not line-edit a district courts’ opinion.) Thus, Defendant cannot appeal just to remove the credibility finding from the Transfer Order.

Even if Defendant were to find grounds to appeal, the Ninth Circuit would review the overall finding, not the reasoning. If the WDTX came to the proper legal conclusion for erroneous reasons, the Ninth Circuit would affirm the conclusion regardless of that reasoning and

would likely not rule on the erroneous nature of the prior order. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019). Thus, if Defendant's purpose is only to vacate in part the credibility finding, there would be no reason to appeal.

B. This Court Should Not Revisit the Transfer Order

Even if the Court were to overlook these procedural bars to Defendant's motion, there is no basis to exercise your discretion and vacate the credibility finding in the Transfer Order. Although Defendant contends this is an exceptional circumstance in which the Court may revisit a prior interlocutory order, it has not met its burden of demonstrating that such relief is warranted. (Dkt. No. 108 at 9.)

1. This is not an Exceptional Circumstance

Exceptional circumstances occur where the Court to which a case was transferred believes either a prior order was legally improper or the prior order had an error that would make the trial useless. *Fairbank* 212 F.3d at 532-33. Here, the convenience factors weighed in favor of transfer and the court correctly ordered transfer. Thus, there was no legal error in the Transfer Order.

Defendant argues that the credibility finding was erroneous and its existence in the Transfer Order will render the trial unfair. A court may find an exceptional circumstance where it is ultimately responsible for the legal sufficiency of the ruling. *Id.* at 530. Though the credibility finding may be erroneous, it is dicta and not a legal judgment. The legal judgment was the decision to transfer, not the reasoning the court to get there. Because the decision to transfer was correct, there is no erroneous legal decision for this Court to revisit. Thus, error in the credibility finding is not reason for this Court to revisit the Transfer Order.

Additionally, an erroneous credibility finding will not cause an unfair trial. Defendant worries that if the credibility finding stands, Plaintiff will use it to discredit the declarant as a witness at trial. (Dkt. No. 97 at 17-18.) However, the Transfer Order is a pretrial order which will not have an impact on the trial. Similarly, because the credibility finding is dicta, it will not be

admitted as evidence at trial. *See Cetacean Cmty.*, 386 F.3d at 1173. The Transfer Order will not in any way render the trial unjust, thus, there is no reason to revisit the Transfer Order.

2. Defendant's Proposed Law-of-the-Case Doctrine Does Not Apply

Instead of the cogent reasons or exceptional circumstances standard, Defendant argues that law-of-the-case principles apply here. "Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (cleaned up). *U.S. v. Alexander* provides a limited set of reasons a court can depart from the law of the case, including (1) the first decision was clearly erroneous; (2) the evidence on remand is substantially different; or (3) a manifest injustice would otherwise result. 106 F.3d 874, 876 (9th Cir. 1997). Defendant asks this Court to exercise its discretion to vacate in part the Transfer Order for three reasons: (1) the credibility finding was clearly erroneous; (2) Defendant claims new evidence contravenes the court's credibility finding; and (3) maintaining the findings is manifestly unjust. (Dkt. No. 97 at 13.)

However, because the issue here is not a legal decision, but rather reasoning and dicta, the law-of-the-case principles do not apply. Even if this Court were to apply the *Alexander* factors, there is no reason to revisit the Transfer Order. "The policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Christianson*, 486 U.S. at 816. As discussed above, there is no compelling reason to revisit the Transfer Order. Thus, this case does not meet the high threshold outlined in *Christianson* and this Court should not revisit the Transfer Order.

CONCLUSION

For the reasons stated above, I recommend you DENY the motion to vacate in part.

Applicant Details

First Name **Robert**
 Middle Initial **M.**
 Last Name **White**
 Citizenship Status **U. S. Citizen**
 Email Address white.r23@law.wlu.edu

Address
Address
Street
84 Tuckaway Ridge
City
Lexington
State/Territory
Virginia
Zip
24450
Country
United States

Contact Phone Number **301-928-8550**

Applicant Education

BA/BS From **Tulane University**
 Date of BA/BS **May 2015**
 JD/LLB From **Washington and Lee University School of Law**
<http://www.law.wlu.edu>
 Date of JD/LLB **May 12, 2023**
 Class Rank **50%**
 Law Review/Journal **Yes**
 Journal(s) **German Law Journal**
 Moot Court Experience **Yes**
 Moot Court Name(s) **John W. Davis Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **Yes**
Post-graduate
Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work **Appellate, Habeas, Immigration, Prison**
Experience **Litigation, Pro Se, Social Security**

Recommenders

Fraley, Jill
fraleyj@wlu.edu
Murchison, Brian
murchisonb@wlu.edu
540-458-8511
Klein, Alex
aklein@wlu.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

84 Tuckaway Ridge
Lexington, Virginia 24450

March 27, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a law student at Washington and Lee University, and I want to clerk for you during the 2024–2025 term. This would be my second clerkship and a natural step in my career as a public servant and litigator.

After I graduate, during the 2023–2024 term, I will clerk for the Hon. Diana Song Quiroga, Magistrate Judge, at the Southern District of Texas, Laredo Division. The Southern District has the busiest federal criminal docket in the United States, and Laredo is the busiest land port in Texas. Judge Song Quiroga has primary responsibility for pre-trial criminal matters there. I am assured that, after a year in her chambers, I will be expert in criminal procedure, especially relating to transnational organized crime and security. This may prove useful in your chambers: I could help with these cases confidently, straight away.

My experience on the border will complement my earlier work on public matters. These included counterintelligence, registration of foreign agents, global access to dangerous speech, and elections integrity. On campus, I organized student activities and speaker panels, for which the American Constitution Society named me a Next Generation Leader. I have gained some feeling for public responsibility and will gain more soon; I hope this prepares me to contribute from day one at the Eastern District of Virginia.

I intend to make my career practicing the most intricate law, on the weightiest questions, with the highest stakes. Your docket would expose me to this standard, and, for the rest of my career, I would hold myself to it. Please call me any time to discuss how I could be of service to you. Thank you for your consideration.

Yours faithfully,



Robert White

Enclosures

ROBERT WHITE

84 Tuckaway Ridge, Lexington, Virginia 24450 • (301) 928-8550 • white.r23@law.wlu.edu

EDUCATION

Washington and Lee University School of Law, Lexington, Virginia, 2023

Juris Doctor, GPA: 3.616

- Lead Articles Editor, German Law Journal
- Next Generation Leader, American Constitution Society, for service as chapter president
- Awardee, Baronial Order of Magna Charta Scholarship, for excellence in const. law
- Volunteer, Walker Program, gave legal assistance to local entrepreneurs
- Member, Selden Society, supporting study of English legal history

Tulane University, New Orleans, Louisiana, 2015

Bachelor of Arts, Political Economy (International Perspectives)

Bachelor of Arts, Spanish and Portuguese, with departmental honors

Minor, Latin American Studies

- *cum laude*, Distinguished Scholar, Dean's List
- Study abroad: Madrid, spring 2014; São Paulo, fall 2014
- Internship: Organization of American States, Washington, D.C., summer 2013

EXPERIENCE

U.S. District Court for the Southern District of Texas, Laredo, Texas, 2023–2024

Term Law Clerk, Chambers of The Honorable Diana Song Quiroga, Magistrate Judge

- For primary magistrate ruling on pre-trial matters, predominantly about transnational organized crime and border security, in nation's busiest federal criminal docket

Department of Justice, National Security Division, Washington, D.C., 2022–2023

Intern, Counterintelligence and Export Control Section

- Recommended inquiries under Foreign Agents Registration Act, collected evidence for espionage trial, and drafted memoranda on Classified Information Procedures Act

U.S. Attorney's Office for the District of Maryland, Baltimore, Maryland, summer 2022

Intern, Criminal and Civil Divisions

- Drafted habeas corpus answers, asset forfeiture memoranda, and civil trial motions

Federal Communications Commission, Washington, D.C., summer 2021

Intern, Public Safety and Homeland Security Bureau

- Drafted memoranda on net neutrality, cybersecurity, and sources of authority

U.S. District Court for the District of Maryland, Greenbelt, Maryland, summer 2021

Intern, Chambers of The Honorable Charles B. Day, Magistrate Judge

- Drafted opinions on Cruel and Unusual Punishment and Federal Tort Claims Act

CounterAction, Washington, D.C., 2019–2020

Consultant

- Collected open-source intelligence on disinformation in foreign elections and COVID-19

Nobody Media, Washington, D.C., 2018–2020

Associate Strategist

- Crafted and carried out social media strategy for national brands near public policy
- Reached 150,000 people daily, delivered 66 million paid impressions on FB+IG, and grew Twitter followership organically 150% for a leading public-history non-profit

Supreme Court Historical Society, Washington, D.C., 2017–2018

Publications and Outreach Assistant

- Wrote articles on Court events and constitutional history for Quarterly publication

GMMB+, Washington, D.C., 2016

Media Assistant

- Team placed advertisements for a major party's candidate for president; national, senatorial, and congressional campaign committees; governors's association; and PACs
- Tracked and summarized opponents's daily media spending on state and federal races

Print Date: 05/14/2023

Page: 1 of 3

Student: Robert MacCallum White

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



SSN: XXX-XX-2679

Entry Date: 08/17/2020

Date of Birth: 08/06/XXXX

Academic Level: Law

2020-2021 Law Fall

08/17/2020 - 11/24/2020

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	A-	4.00	4.00	14.68	
LAW 140	CONTRACTS	A-	4.00	4.00	14.68	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 165	LEGAL WRITING I	A-	2.00	2.00	7.34	
LAW 190	TORTS	B+	4.00	4.00	13.32	

Term GPA: 3.576

Totals: 14.50 14.50 51.86

Cumulative GPA: 3.576

Totals: 14.50 14.50 51.86

2020-2021 Law Spring

01/11/2021 - 04/27/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 166	LEGAL WRITING II	B+	2.00	2.00	6.66	
LAW 179	PROPERTY	A-	4.00	4.00	14.68	
LAW 195	TRANSNATIONAL LAW	B+	3.00	3.00	9.99	

Term GPA: 3.505

Totals: 16.50 16.50 57.84

Cumulative GPA: 3.538

Totals: 31.00 31.00 109.69

2020-2021 Law Summer

05/16/2021 - 08/07/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	

Term GPA: 0.000

Totals: 1.00 1.00 0.00

Cumulative GPA: 3.538

Totals: 32.00 32.00 109.69

Print Date: 05/14/2023

Page: 2 of 3

Student: Robert MacCallum White

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116

**2021-2022 Law Fall**

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 216	BUSINESS ASSOCIATIONS	B+	4.00	4.00	13.32	
LAW 237	COMPARATIVE CONST LAW SEMINAR	A-	2.00	2.00	7.34	
LAW 285	EVIDENCE	A	3.00	3.00	12.00	
LAW 300	FED JURISDICTION & PROCEDURE	P	3.00	3.00	0.00	
LAW 301	FOURTH AMENDMENT AND TECH SEM	A-	2.00	2.00	7.34	
LAW 365P	MERGERS & ACQUISIT ACTUAL PRAC	A-	2.00	2.00	7.34	
Term GPA: 3.641			Totals:	16.00	16.00	47.34
Cumulative GPA: 3.568			Totals:	48.00	48.00	157.03

2021-2022 Law Spring

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 222	MASS MEDIA LAW	B+	2.00	2.00	6.66	
LAW 365P	MERGERS & ACQUISIT ACTUAL PRAC	A-	3.00	3.00	11.01	
LAW 390	PROFESSIONAL RESPONSIBILITY	A-	3.00	3.00	11.01	
LAW 410	SECURITIES REGULATION	P	3.00	3.00	0.00	
LAW 410X	SECURITIES REGULATION SKILLS	A-	1.00	1.00	3.67	
LAW 428P	TRIAL ADVOCACY PRACTICUM	A-	3.00	3.00	11.01	
Term GPA: 3.613			Totals:	15.00	15.00	43.36
Cumulative GPA: 3.578			Totals:	63.00	63.00	200.39

2021-2022 Law Summer

05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
Term GPA: 0.000			Totals:	1.00	1.00	0.00
Cumulative GPA: 3.578			Totals:	64.00	64.00	200.39

Print Date: 05/14/2023

Page: 3 of 3

Student: Robert MacCallum White

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



2022-2023 Law Fall

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 707L	Skills Immersion: Litigation	P	2.00	2.00	0.00	
LAW 733	Criminal Procedure: Investigation	A	3.00	3.00	12.00	
LAW 739	Federal White Collar Crime	A	3.00	3.00	12.00	
LAW 817	Statutory Interpretation Practicum	A	4.00	4.00	16.00	
LAW 940	General Externship	B+	1.00	1.00	3.33	
LAW 940FP	General Externship: Field Placement	P	3.00	3.00	0.00	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	

Term GPA: 3.939

Totals:

17.00 17.00 43.33

Cumulative GPA: 3.637

Totals:

81.00 81.00 243.72

2022-2023 Law Spring

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 610	Independent Research	CR	1.00	1.00	0.00	
LAW 701	Administrative Law	B+	3.00	3.00	9.99	
LAW 731	Immigration Law	A-	3.00	3.00	11.01	
LAW 765	Criminal Procedure: Adjudication	B+	3.00	3.00	9.99	
LAW 793	Federal Income Tax of Individuals	A-	3.00	3.00	11.01	
LAW 969	German Law Journal	CR	1.00	1.00	0.00	

Term GPA: 3.500

Totals:

14.00 14.00 42.00

Cumulative GPA: 3.616

Totals:

95.00 95.00 285.72

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	95.00	95.00	3.616
External:	0.00	0.00	
Overall:	95.00	95.00	3.616

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.

The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.

The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commerce (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	Superior.
A	4.00	
A-	3.67	
B+	3.33	Good.
B	3.00	
B-	2.67	
C+	2.33	Fair.
C	2.00	
C-	1.67	
D+	1.33	Marginal.
D	1.00	
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 and a cumulative GPA of at least 2.000 and no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical	Letter	Grade*	Grade**	Points	Description
4.0	A			4.00	
	A-			3.67	
3.5				3.50	
	B+			3.33	
3.0	B			3.00	
	B-			2.67	
2.5				2.50	
	C+			2.33	
2.0	C			2.00	
	C-			1.67	
1.5				1.50	This grade eliminated after Class of 1990.
	D+			1.33	
1.0	D			1.00	A grade of D or higher in each required course is necessary for graduation.
	D-			0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5				0.50	This grade eliminated after the Class of 1990.
0.0	F			0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.

** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu


University Registrar

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I have known Robert since he began at Washington and Lee. He was a member of my Constitutional Law course last year and I have continued to be an advisor for him. Overall, I can say that I know Robert quite well and can highly recommend him. He is smart, mature, an avid reader and thinker outside of law school, and a hard worker.

Robert came to law school with a number of professional experiences that prepared him well for the challenges of law school. He is an enthusiastic (but not overbearing) participant in class. In a semester that began with the January 6th events in D.C., you can imagine that Constitutional Law was polarizing for students. In that atmosphere, Robert was a breath of fresh air. He was thoughtful, respectful, genuine, and professional. He drew upon a wealth of historical knowledge to speak engagingly with his peers, drawing on facts and legal arguments more than opinion. I usually have to teach (and sometimes nearly beg) students to do that. As a result, I nominated Robert for an award for a Constitutional Law student from the Baronial Order of the Magna Carta. Robert won the award last year.

More personally, Robert is mature and very professional. He presents himself in a measured, thoughtful way. He thinks in terms of data, but approaches it with the viewpoint of a seasoned reader of history and law. He is very poised and gracious in speaking with others, particularly when opinions are divided. He is the type of person I think would make an excellent judge someday. In that way I believe that a clerkship experience would be particularly beneficial to him. Simultaneously, he would be a valuable contributor to chambers.

Best Regards,

Jill M. Fraley
Professor of Law

Jill Fraley - fraleyj@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

This is to recommend one of my students, Robert White, who is applying for a clerkship in your chambers. In May, 2023, Mr. White will graduate from Washington and Lee University School of Law, where I have been a faculty member since 1982. In his second year of law school, Mr. White took my course in Mass Media Law, a survey of leading cases under the Speech and Press Clauses and various state and federal statutes. Since then, we have had numerous conversations outside of class about his course of study and professional goals. Based on these contacts, I have a good sense of his abilities and potential for success in a judicial clerkship.

Mr. White would be a truly outstanding clerk, and I recommend him enthusiastically. In my class, he exhibited that all-too-rare capacity to get to the very heart of a legal question without delay, articulating the precise issue and recognizing the various options that a court could consider in shaping and applying legal doctrine. I attribute this ability at least in part to the immense preparation that Mr. White clearly brought to every class. I could count on him in particular for analysis of how a particular case fit into the larger context of First Amendment case law and how some decisions reflected background values about the role of speech and press in a democracy such as ours.

I required each student in the class to deliver a formal re-argument for one of the parties in an assigned case. By luck of the draw, Mr. White argued the respondent's side in the classic case of *Miami Herald Publishing Co. v. Tornillo*. As I expected, he did a splendid job. He smartly focused on the factual context and legal precedent supporting the state right-to-reply statute in that case, superbly demonstrating why the case was as challenging as it was. In discussion after his argument, he carefully spoke to the relevance of *Tornillo* in current litigation concerning state laws regulating social media platforms. All in all, Mr. White set a very high standard indeed for such presentations.

I also recommend Mr. White simply as a person. He has a positive personality and a warm sense of humor. He interacts well with his professors and peers, and I am confident that he would bring a collaborative, collegial spirit to any professional environment.

For these reasons, I hope that you will give careful consideration to Mr. White's application. In my judgment, he has the intellect, drive, and maturity to succeed quite brilliantly in a judicial clerkship and later in the practice of law.

Sincerely,

Brian C. Murchison
Professor of Law

Brian Murchison - murchisonb@wlu.edu - 540-458-8511

March 30, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly encourage you to consider Robert White for a judicial clerkship in your chambers. I've taught Robert in two classes, Criminal Law, and a seminar I teach that addresses the Fourth Amendment and Technology. Robert has been an enthusiastic and engaged student in both of these classes. At the time I taught Robert, I was employed at Washington & Lee Law as a Visiting Assistant Professor. Although I have since accepted a position as an Assistant Professor of Law at St. Mary's University, Robert and I are still in touch.

Criminal Law can be a challenging subject for first-year students, who may find the material—and lack of a singular bright-line rule frustrating. Robert was no exception, but he enjoyed the challenge of dealing with the complexities and gray areas of criminal law. Many first-year students are nervous about uncertainty. Robert perceived it as an opportunity to broaden his understanding. I particularly enjoyed his contributions to class discussions on justification and excuse defenses, during which he offered additional hypotheticals and thought experiments. His discussions added value to class discussion and his colleagues' understanding.

Robert is an extremely curious person. He's interested not only in understanding a particular legal rule, but also its origins and interpretive history. One day after a Criminal Law class, Robert approached me to discuss in significant detail, the judicial reasoning in a tricky case that drew narrow distinctions between complicity and conspiracy. We had a good discussion of the substantive issues and standards for judicial review in a greater depth than most first-year students want to undertake. I was impressed by his determination to understand the rule in the case as well as the analytic path—for him, the correct analytic path is just as important as the result. He demonstrated the same tenacity in the Fourth Amendment and Technology Seminar as he developed his seminar paper.

Students are required to write a paper about a topic at the intersection of the Fourth Amendment and technology. Robert opted to write his paper about the private search doctrine and the potential consequences of the doctrine as it applies to government-induced backdoors in commercially available encryption products. Robert's paper provided a thorough historical analysis of the origins of the private search doctrine, arguing that *Burdeau v. McDowell* failed to give sufficient weight to earlier precedent. It was a challenging topic, necessitating significant historic research. Robert's paper demonstrated excellent assessment of the precedent underlying *Burdeau* and impressive research depth. His paper opened with a compelling discussion of the complicated facts underlying internet encryption and the NSA's potential use of backdoor access to commercially available software. The paper was well-written, organized, and a pleasure to read.

Robert was genuinely excited to write the paper—his footnotes confirm the sincerity of his interest in legal writing and research. While he wanted to engage in a deeper historical dive, he independently recognized that it was outside the limits of the assignment and accepted and incorporated feedback appropriately and professionally to adjust his paper. He's able to balance his own personal curiosity against wandering too far afield. Based on his work in my class, Robert would thrive in positions that involve careful tracing of legislative history and judicial interpretation.

Robert demonstrated real skill in providing feedback as well as receiving it. Seminar students are required to review another student's in-progress draft and offer substantive feedback. Robert excelled in the peer review assignment. He offered constructive suggestions that strengthened his colleague's arguments as well as the organization and structure of the paper. Several of the suggestions he noted were issues I had spotted in my own review of the draft. Robert's feedback was also professionally worded and courteous. Robert also did something that few of his other colleagues did—he indicated places where his colleague had done an especially good job framing an argument or concept. Robert's colleague appreciated the care and thought he put into proofing, as well as his collaborative approach.

Robert is also determined to contribute to the wellbeing of his community. Washington & Lee Law School's building has many large glass windows that are a hazard for birds—birds fly into the glass and are injured or sometimes killed. Robert, an avid birdwatcher, has been working to convince the law school to implement steps to protect local birds. It may seem like a minor issue, but Robert's determination to do something about a problem that he thinks is unaddressed reflects his broader personal values.

I appreciate Robert's thoughtfulness about who he will be as a member of the legal profession. We've had regular out-of-class conversations about the role a lawyer should play in the legal system as well as in sustaining and building a more just world. I find his frustration with injustice and his insistence that lawyers should not forget the importance of all struggles—poverty, education, and employment as part of their duties of advocacy inspiring and encouraging for the future of the legal profession.

It's been a pleasure to teach Robert and I'm excited to watch his professional development. I was delighted to hear that he had

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accepted a clerkship with a federal magistrate judge for the 2022–2023 term— He will make an excellent law clerk. If there is any additional information I can provide about Robert's qualifications, please do not hesitate to contact me at aklein1@stmarytx.edu or at 210-431-8056.

Sincerely,

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WRITING SAMPLE

This summer, I interned at the United States Attorney’s Office for the District of Maryland. While I was there, a man serving life for production of child pornography made a habeas corpus motion, and I was assigned the response. The man styled his motion, “Petition for Writ of Habeas Corpus Under: 28 U.S.C. § 2241, via the Savings Clause Under § 2255(e).” No one at the Office knew what this meant, and I was given a long leash to figure it out.

I needed the long leash. The record was cluttered with unreliable testimony, tampered-with evidence, imprecise argument, informal findings of fact, and an ambiguous procedural history. Moreover, the law of the case was a moving target. First, the Supreme Court decided *Brown v. Davenport*, 142 S. Ct. 1510 (2022), which breathed new life into some equitable and prudential precedents from before the Antiterrorism and Effective Death Penalty Act of 1996. Then, the Court granted certiorari in *Jones v. Hendrix*, 8 F.4th 683 (8th Cir. 2021), and the Solicitor General notified the Court that the government would not defend the rationale of the decision below. This put new rules and actual innocence in the spotlight, and I had to invoke *Brown* without upsetting the Department’s position in *Jones*.

In the end, the Office filed my response without substantive edits; my supervisor changed a few dozen words at the most. This sample contains my discussion of the savings clause.

Petitioner's Motion, construed at § 2255, cannot overcome AEDPA's procedural bars at 28 U.S.C. § 2255(f), (h)(2). *See infra* pp. 46–53. The Motion must be construed at § 2255 because Petitioner cannot pass through the savings clause at § 2255(e).

C. Section 2255 Is Not Inadequate or Ineffective, So Petitioner Cannot Evade AEDPA's Procedural Bars

A petitioner authorized to use § 2255 cannot make a collateral attack at another section unless § 2255 is “inadequate or ineffective to test the legality of his detention.” § 2255(e) (“savings clause”). Where this is the case, a petitioner may use 28 U.S.C. § 2241, an older section enacted in 1867. *See Hayman*, 342 U.S. at 223. This avoids constitutional problems that would arise if, for example, the petitioner were to lack an adequate opportunity to present his claims fairly. *See United States v. MacCollom*, 426 U.S. 317 (1976) (discussing in various opinions *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)); *Swain v. Pressley*, 430 U.S. 372, 381–83 (1977). To proceed at § 2241, a petitioner must establish inadequacy or ineffectiveness at § 2255. *Farkas v. Butner*, 972 F.3d 548, 553 (4th Cir. 2020). The savings clause is jurisdictional. *See supra* note 9.

The Fourth Circuit first considered the savings clause in *In re Jones*, 226 F.3d 328 (4th Cir. 2000). There, Jones was convicted of using a firearm while trafficking drugs. 226 F.3d at 330. Although Jones had not carried the firearm, constructive possession was sufficient to establish “use” under the Circuit's precedents, and his insufficiency argument failed on direct appeal. *Id.* at 330, 334 n.4. His collateral attack at § 2255 also failed. *Id.* at 330. Later that year, the Supreme Court overruled the Circuit's “use” precedents, *Bailey v. United States*, 516 U.S. 137 (1995), and required the government to prove active employment of the firearm. 226 F.3d at 330. Shortly thereafter, Congress enacted AEDPA. *Id.* Jones moved the Fourth Circuit for authorization to file a second or successive § 2255 motion on a theory that *Bailey* had announced a new rule, but the court of appeals denied the motion because the new rule was not one of constitutional law and had

not been made retroactive by the Supreme Court. *Id.* Shortly thereafter, the Supreme Court decided *Bousley*, 523 U.S. 614, making *Bailey* retroactive to cases on collateral review. 226 F.3d at 330. Again, Jones moved for authorization to file a second or successive § 2255 motion. *Id.* Again, the court denied the motion. *Id.* Jones moved for authorization a third time, now arguing in the alternative that § 2241 should be available to him because § 2255 was inadequate or ineffective to test the legality of his detention. *Id.* at 331.

The Fourth Circuit agreed. Although § 2255 “is not inadequate or ineffective merely because an individual is unable to obtain relief under that provision,” *id.* at 333 (citing *inter alia In re Vial*, 115 F.3d at 1194 n.5), the court reasoned that the savings clause could not be meaningless. *Id.* The court approved the holdings of her sister circuits, which, at the time, uniformly found inadequacy or ineffectiveness where “an individual is incarcerated for conduct that is not criminal but, through no fault of his own, has no source of redress.” *Id.* at 333 & n.3. The court announced that § 2255 is inadequate or ineffective where,

(1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Id. at 333–34. Applying this test to Jones, the court observed that he was “incarcerated for conduct that is not criminal” under *Bailey*, which “was decided after Jones’ appeal and after the decision on his first § 2255 motion.” *Id.* at 334. The court held § 2255 inadequate or ineffective to test the legality of his detention. *Id.*

The Fourth Circuit revisits and approves *Jones* from time to time. *Rice v. Rivera*, 617 F.3d 802 (4th Cir. 2010) (per curiam) (failing *Jones* second prong); *United States v. Surratt*, 797 F.3d 240 (4th Cir. 2015) (failing *Jones* second prong without expressly approving test, rather approving

Jones as matter of constitutional avoidance for cases of actual innocence), *appeal dismissed as moot en banc*, 855 F.3d 218, and *abrogated by Hahn v. Moseley*, 931 F.3d 295, 302–07 (4th Cir. 2019) (passing *Jones*, with unanimous panel and concurrence explaining, “[T]he Fourth Circuit does not require an actual innocence analysis under the savings clause”); *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018) (modifying second and third *Jones* prongs and adding fourth prong in challenge to sentence but not conviction);¹⁰ *Lester v. Flournoy*, 909 F.3d 708 (4th Cir. 2018) (passing *Wheeler*); *Braswell v. Smith*, 952 F.3d 441 (4th Cir. 2020) (passing *Wheeler* and clarifying at second prong, “[T]he combination of the change in settled substantive law and its retroactivity must occur after the first § 2255 motion has been resolved,” 952 F.3d at 448); *Farkas v. Butner*, 972 F.3d 548 (4th Cir. 2020) (failing second and third *Jones* prongs and declining to apply *Wheeler* in challenge to conviction); *Young v. Antonelli*, 982 F.3d 914 (4th Cir. 2020) (making new rule retroactive to pass *Wheeler* second prong); *Ham v. Breckon*, 994 F.3d 682 (4th Cir. 2021) (failing *Wheeler* second prong); *Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562 (4th Cir. 2021) (failing *Jones* first prong). These cases place importance on the petitioner’s opportunity to take advantage of a new rule, allowing him to proceed at § 2241 only where § 2255 itself, and not some procedural failing on the petitioner’s part, would otherwise be the petitioner’s only obstacle to invoking the rule. *See Marlowe*, 6 F.4th at 570–72; *Braswell*, 952 F.3d at 447–51;

¹⁰ *Wheeler* announced a test for sentences similar to the *Jones* test for convictions:

(1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

886 F.3d at 429. Because Petitioner invokes *Palomino–Coronado* to challenge his convictions rather than his sentences, *Jones* controls this case, and *Wheeler* has no direct application. *See Farkas*, 972 F.3d at 559–60. But insofar as they develop the principles on which *Jones* was announced, *Wheeler* and its progeny might inform an application of *Jones*.

Rice, 617 F.3d at 807. *But see Wheeler*, 886 F.3d at 430 (declining to give controlling weight to argument previously disposed of and later vindicated by new rule (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (“[T]he privilege of habeas corpus entitles the prisoner to a *meaningful* opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.” (emphasis supplied and internal quotation marks omitted in *Wheeler*))))). The Fourth Circuit polices § 2241 rigorously. *See Farkas*, 972 F.3d at 560 (“*Wheeler* and *Jones* are not guideposts marking a broad path yet to be cut—each is a narrow, well-delineated trail by which certain petitioners may pursue appropriate relief.”).¹¹

Here, § 2255 is not inadequate or ineffective to test the legality of Petitioner’s detention because, needing to satisfy each prong of *Jones*, Petitioner fails each.

1. Prong One: “At the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; . . .”

The Fourth Circuit squarely interpreted the first prong of *Jones* in *Marlowe v. Warden, FCI Hazelton*, 6 F.4th 562 (4th Cir. 2021). In 2003, Marlowe supervised correctional officers and, in a heinous deprivation of federal rights at 18 U.S.C. § 242, oversaw the killing of a detainee. 6 F.4th

¹¹ On May 16, 2022, the Supreme Court granted certiorari in *Jones v. Hendrix*, 8 F.4th 683 (8th Cir. 2021). No. 21-857. The issue there is whether a circuit, like the Eighth Circuit, may refuse to provide a test of inadequacy or ineffectiveness at § 2255(e), like the Fourth Circuit provided in *In re Jones*, 226 F.3d at 333–34, to a petitioner who failed at his earlier proceedings to raise an argument, later vindicated by a new rule, that circuit precedent would have made futile to raise at the time. On June 17, 2022, the Solicitor General notified the Court that the government would not defend the rationale of the decision below. Letter from Elizabeth B. Prelogar, Solicitor General, to the Hon. Scott S. Harris, Clerk, Supreme Court. On August 8, 2022, the Solicitor General filed a Brief for Respondent (No. 21-857). The position of the Department of Justice is,

a federal prisoner who is barred from filing a second Section 2255 motion under Section 2255(h) may invoke the saving clause and seek habeas relief if he (1) contends that a new statutory interpretation decision of this Court establishes that his conduct was not criminal, and (2) establishes that he is actually innocent in light of the narrowed definition of the offense—that is, that no reasonable juror would vote to find him guilty in light of all available evidence.

Brief for Respondent. Here, Petitioner would fail the Department’s test because, in addition to being barred at § 2255(h), his Motion is time-barred at § 2255(f), because no new statutory interpretation of the Supreme Court makes Petitioner’s conduct not criminal, and because Petitioner cannot establish his actual innocence. The Supreme Court has scheduled oral argument in *Jones v. Hendrix*, No. 21-857, for November 1, 2022.

at 565–66. Instructed that the government needed only prove that bodily injury or death was “a natural and foreseeable result” of Marlowe’s conduct, the jury convicted him, and the trial court sentenced him to life imprisonment. *Id.* at 566–67. His direct appeal and first collateral attack failed, and he invoked the savings clause to make another attack. *Id.* at 567. Now, he claimed that the Supreme Court’s decision in *Burrage v. United States*, 571 U.S. 204 (2014) (requiring but-for causation where death or serious bodily harm triggers mandatory minimum sentence under drug statute), which the Sixth Circuit had made retroactive to cases on collateral review,¹² invalidated his jury instructions. *Id.* The district court dismissed Marlowe’s application, and he appealed to the Fourth Circuit. *Id.* at 567–68.

The Fourth Circuit placed importance on the fact that “no binding precedent” had previously foreclosed Marlowe’s new causation argument. *Id.* at 568. The court observed,

The law was settled and adverse to the prisoners in *Jones* and the cases on which it relied because, at the time of their convictions, binding precedent foreclosed the statutory interpretation they later claimed undercut the legality of their convictions. . . . *Jones* is thus premised on the understanding that binding precedent previously prevented the prisoner from asserting the argument he later claims a change in the law has made available to him.

Id. at 570. The court reviewed *Jones* and its progeny and identified a consistent focus on whether settled law previously foreclosed an argument “such that raising it earlier was or would have been futile.” *Id.* at 570–71. The court further observed that “[p]rinciples of procedural default sharply limit” collateral review of an argument that a petitioner “could have made, but did not,” at trial or on direct appeal. *Id.* at 571. “The exclusion of previously available claims from Section 2255’s

¹² Marlowe was convicted in the Middle District of Tennessee but was serving his sentence in the Northern District of West Virginia, and his § 2241 motion was properly made where he was restrained. 6 F.4th at 567 n.2. The Fourth Circuit applied *Jones* as its own procedural law and, in deciding whether settled law established the legality of the conviction, applied the Sixth Circuit’s substantive law. 6 F.4th at 572. This jurisdictional feature of § 2241 was a primary reason for which Congress enacted § 2255, at which motions are made in the sentencing court. § 2255(a); see *Hayman*, 342 U.S. at 214 n.18. Here, Petitioner was convicted in and is serving his sentence in the District of Maryland, so the point is only academic.

reach compels a similar approach to the savings clause,” at least where a petitioner could have asserted “an argument on an unsettled point of law” at an earlier proceeding. *Id.* at 571–72. The court held that, to satisfy the first prong of *Jones*, “a prisoner must show that binding precedent foreclosed the argument he later presses to collaterally attack his conviction.” *Id.* at 573.

Marlowe, attempting to show that *Burrage* changed settled Sixth Circuit law under which he was convicted, pointed to a 2009 Sixth Circuit case, about an unrelated statute, that discussed a 1994 Sixth Circuit case, about an unrelated statute, that, in upholding a “natural and foreseeable result” instruction, cited approvingly a 1979 Fifth Circuit case about § 242. *Id.* at 572. The Fourth Circuit did not accept that these cases foreclosed Marlowe’s causation argument before his conviction became final. *Id.* at 572–73. Moreover, the 2009 case stated that the Sixth Circuit never interpreted the “results” language at § 242, so the law “could hardly be ‘settled,’” and the 1994 case was unpublished. *Id.* “A nonprecedential decision interpreting a different statute cannot establish ‘settled law.’” *Id.* at 573 (citing *Ham*, 994 F.3d at 693). Because Marlowe had not shown that binding Sixth Circuit precedent would have made it futile to raise his causation objection at trial, he failed the first prong of *Jones*. *Id.*

Here, Petitioner cannot show that binding precedent foreclosed his purpose argument at his trial, direct appeal, or first collateral attack. The argument was there to be made, and, in fact, he made it at each proceeding. Trial Tr. at 130–32 (Apr. 22, 2011); Trial Tr. at 51–52, 88–89, 103–04 (May 6, 2011); Br. Appellant 38–46, *United States v. Davison*, 492 F. App’x 391 (4th Cir. Jan. 6, 2012) (No. 11-4778), ECF No. 26; Reply Br. Appellant, 492 F. App’x 391 (May 1, 2012) (No. 11-4778), ECF No. 47; Mot. Vacate (March 13, 2014), ECF No. 175. Absent from these arguments was any mention of binding Fourth Circuit precedent. Rather, the parties relied on the plain meaning of the statute, Congress’s intent in enacting it, the language of the model jury

instructions, and one case examining another child exploitation statute, *United States v. Sirois*, 87 F.3d 34 (2d Cir. 1996). *E.g.*, Trial Tr. at 130–32 (Apr. 22, 2011); Government’s Resp. Def.’s Rule 29 Mot. 4, ECF No. 102.¹³ Of course, as a Second Circuit case, *Sirois* could not have settled the law of the District of Maryland or Fourth Circuit. *See, e.g., McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012), *aff’d*, 569 U.S. 221 (2013). Moreover, Petitioner raised *Sirois* in support of his own argument. Trial Tr. at 132 (Apr. 22, 2011). *Palomino–Coronado*, 805 F.3d 127, on which Petitioner now relies, did not disapprove the standard that *Sirois* announced. And *Palomino–Coronado* and *McCauley* cited *Sirois* approvingly. 805 F.3d at 131, 132; 983 F.3d at 696, 697. Whatever it stood for at his earlier proceedings, *Sirois* did not prevent Petitioner from raising the argument that he now relies on *Palomino–Coronado* to raise. Petitioner offers no authority, and the government is aware of none, that could have been considered binding precedent foreclosing Petitioner’s purpose argument at the earlier proceedings. The record of argument on this issue, bearing no hint of binding precedent, suggests that the argument was not foreclosed by binding precedent or anything else. Finally, the argument’s failure at the earlier proceedings does not mean that raising it was futile. *See Marlowe*, 6 F.4th at 570. To the contrary, the subsequent clarifications in *Palomino–Coronado* and *McCauley* indicate that the meaning of “purpose” at 18 U.S.C. § 2251(a) was previously unsettled and open to argument. In 2015, the *Palomino–*

¹³ The parties also relied on *United States v. Broxmeyer*, 616 F.3d 120 (2d Cir. 2010), and *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008). *See* Trial Tr. at 132 (Apr. 22, 2011); Government’s Resp. Def.’s Rule 29 Mot. 4, ECF No. 102; Br. Appellant 38–46, *United States v. Davison*, 492 F. App’x 391 (4th Cir. Jan. 6, 2012) (No. 11-4778), ECF No. 26; Br. Appellee 52–54, 492 F. App’x 391 (Apr. 2, 2012) (No. 11-4778), ECF No. 39; Reply Br. Appellant, 492 F. App’x 391 (May 1, 2012) (No. 11-4778), ECF No. 47. But these are cases about showing a defendant’s *causation* of the production or transmission of images, not about showing his *purpose* in causing the sexual abuse or in producing images of it. Here, Petitioner’s causation argument related to the fact that C.W. held the phone camera when some of the images were created, whereas Petitioner’s purpose argument related to whether the conspirators abused C.W. for the purpose of producing images. *See* Trial Tr. at 130–32 (Apr. 22, 2011). These were distinct issues, and *Palomino–Coronado* and *McCauley*, on which Petitioner now relies, touched only the purpose issue. Even if the Court were to find causation relevant to purpose, *Broxmeyer* and *Starr*, as Second and Eighth Circuit cases not binding on the District of Maryland or the Fourth Circuit, could hardly have foreclosed any argument to Petitioner as a matter of settled law before his convictions became final. *See Marlowe*, 6 F.4th at 572–73.

Coronado court explained that the Fourth Circuit had never before considered the sufficiency of purpose evidence at § 2251(a), 805 F.3d at 131, thus the law could not have been settled when Petitioner’s conviction became final in 2013. *See Marlowe*, 6 F.4th at 573. Petitioner had a fair opportunity to make his purpose argument, he made it, and he lost it. Now, he does not meet his burden of showing that binding precedent foreclosed it. *See Marlowe*, 6 F.4th at 568.

In *Marlowe*, the petitioner tried to rely on nonprecedential interpretations of other statutes to show that his but-for causation argument at 18 U.S.C. § 242 had been foreclosed at trial by settled law, notwithstanding a contrary statement by the controlling circuit. 6 F.4th at 572–73. This was not enough to show that binding precedent would have made it futile to raise the argument at trial. *Id.* Here, apparently the best jurisprudence available to inform the meaning of “purpose” at 18 U.S.C. § 2251(a), at the time of Petitioner’s trial and direct appeal, was *Sirois*, 87 F.3d 34, an out-of-circuit case about another statute. *See, e.g.*, Trial Tr. at 132 (Apr. 22, 2011); Government’s Resp. Def.’s Rule 29 Mot. 4, ECF No. 102. “A nonprecedential decision interpreting a different statute cannot establish ‘settled law.’” *Marlowe*, 6 F.4th at 573. The Fourth Circuit later explained that it had never considered Petitioner’s point, so the law could not have been settled. *Palomino–Coronado*, 805 F.3d at 131. And the record of Petitioner raising and fully airing his purpose argument, without any mention of binding precedent, makes his showing of futility even weaker than the one in *Marlowe*, where the causation argument was not previously raised. *See Marlowe*, 6 F.4th at 567–68. Like *Marlowe*, Petitioner falls short of showing that it would have been futile to raise his argument at the time of his trial, direct appeal, and first collateral attack.

Thus, Petitioner fails the first prong of *Jones*.

2. Prong Two: “[S]ubsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal;”

When the courts decide to change the way they read a substantive criminal statute, a prisoner who was convicted under the old reading, but who would not have been convicted under the new reading, may apply for a writ of habeas corpus. *See Bousley*, 523 U.S. at 620–21; *Davis*, 417 U.S. at 346–47. That is, when the range of punishable conduct changes, a prisoner should not keep being punished for conduct outside the new range. *See Welch*, 578 U.S. at 134; *Schriro*, 542 U.S. at 353. For example, Jones’s conduct was punished under a statute that criminalized some uses of a firearm, but then the courts decided to change the way they read the statute. *In re Jones*, 226 F.3d at 330–31. Jones’s conduct no longer amounted to a use of a firearm, so he could apply for a writ of habeas corpus. *Id.* at 333–34. The second prong of *Jones* keeps this avenue open to a prisoner, like Jones, to whom, through no fault of the prisoner’s own, a particular provision of AEDPA otherwise would close it. *Id.* at 333 n.3. *See also Wheeler*, 886 F.3d at 430 (explaining habeas “entitles the prisoner to a *meaningful* opportunity” (quoting *Boumediene*, 553 U.S. at 779) (emphasis supplied in *Wheeler*)).

Petitioner fails this *Jones* prong, however, for two reasons. First, *Palomino–Coronado* and *McCauley* did not announce a new rule of substantive law making Petitioner’s conduct not criminal. Second, even if they did, the new rule has not been made retroactive to cases on collateral review.

Palomino–Coronado itself did not announce anything new. Rather, it gave a straightforward application of existing law. In its discussion, the court recited the text of 18 U.S.C. § 2251(a) and noted that it “contains a specific intent element: the government was required to prove that production of a visual depiction was a purpose of engaging in the sexually explicit

conduct.” 805 F.3d at 130. The court elaborated, “That is, a defendant must engage in the sexual activity with the specific intent to produce a visual depiction; it is not sufficient simply to prove that the defendant purposefully took a picture.” *Id.* at 131. Excepting perhaps some observations about “only one photograph” and the ubiquity of cell phones, *id.* at 132–33, this re-arrangement of words was the court’s most original contribution to the meaning of § 2251(a). In the rest of its discussion, the court limited itself to acknowledging persuasive authorities, giving examples of direct and circumstantial evidence on which other courts found “purpose,” and noting that the government failed to present such evidence. *Id.* at 130–33. The court limited its holding to the facts of the case, *id.* at 133, and its opinion was devoid of any more sweeping pronouncement of law. *Palomino–Coronado* was novel in the sense that the government never before had totally failed to present evidence of “purpose” at § 2251(a) in the Fourth Circuit, and the Fourth Circuit never before had occasion to dispose of a case on this ground. *Id.* at 131. But this resulted on new facts, not new law. Relying purely on the plain text of the statute and existing precedent, the court broke no new ground as to the law itself. *See Teague*, 489 U.S. at 301. *Palomino–Coronado* did not announce a new rule.

The only other published Fourth Circuit case interpreting “purpose” at § 2251(a), *McCauley*, 983 F.3d 690, did give a new rule that could, in the right case, be applied retroactively. But this rule was narrow. Expressly approving a hypothetical instruction reading, “the purpose,” *McCauley* held that an instruction reading, “a purpose,” without more, was erroneous because it might have resulted in conviction for a mere incidental or spontaneous purpose. 983 F.3d at 695–97. Here, the instructions at Petitioner’s trial did not include the “a purpose” language. In its closing argument, the government urged, “[The production] wasn’t an accident or something that was just a byproduct of [Petitioner’s] abuse.” Trial Tr. at 70 (May 6, 2011). The Court proceeded

on the pattern instructions, submitted without objection, that recited verbatim the relevant language of § 2251(a), including “the purpose.” Notice Requested Statement Elements 9, 11, ECF No. 88; Verdict Tr. at 55 (May 12, 2011). And when the Court gave its verdict from the bench, it explained,

[A]fter the first video and the conspiracy continues to get the young lady to continue to be available and to perform sexual acts, by the second time it would appear, particularly in view of the interest of the parties, particularly Mr. Davison, in these kinds of pictures, that a purpose was not only just to have sex, but to take pictures.

Verdict Tr. at 59. These words were permissible under *McCauley*, which proscribed only conviction on a finding of “a purpose” *without more*. 983 F.3d at 697. At Petitioner’s trial, there was plenty more. The government presented extensive evidence, including Petitioner’s own testimony, of Petitioner’s sexual interest in children generally and in child pornography specifically. J.A. 660–61, 873, 1212; Trial Tr. at 64 (May 6, 2011). This was “the interest of the parties, particularly Mr. Davison, in these kinds of pictures,” to which the Court referred in finding purpose beyond a reasonable doubt. Verdict Tr. at 59. When it made this finding, the Court also had before it other evidence of Petitioner’s purposeful conduct toward the images. For example, the government referred to the quantity of images produced. Trial Tr. at 68 (May 6, 2011). Petitioner abused C.W. while he knew that the abuse was being recorded. *See id.* at 66–67. Petitioner enjoyed producing the images. *See id.* at 65, 67, 83 (discussing “girls going wild and smiling at the camera”). Petitioner gave C.W. direction as to how to capture the images. J.A. 513, 641–44; S.J.A. 142, 149 (“Hold it right there. . . . Get our faces. Yeah, yeah.”). Petitioner gave the files names like “eleven-year-old pussy” and “evil bitch,” and he organized them in folders, like one named for C.W. Trial Tr. at 156–57, 203 (Apr. 20, 2011), ECF No. 149; J.A. 433, 873–74; *see* Trial Tr. at 70 (May 6, 2011) (describing SD card as trophy collection). The Court might also have inferred purpose from Petitioner’s close familiarity with the individual files, like his memories of C.W.’s hairstyles in different images, of which images showed which faces, and of

which video had a technical defect. J.A. 678–79, 1211. Finally, Petitioner hid the images as he collected them and later attempted to destroy and lied about them, betraying his guilty conscience. *See* Trial Tr. at 69 (May 6, 2011). Held up to the list of circumstantial evidence approved in *Palomino–Coronado*, 805 F.3d at 131–32, any of this evidence—of interest, quantity/repetition of conduct, knowledge, enjoyment, direction, organization, familiarity, or guilty mind—would provide the “more” required to satisfy “the purpose” under *McCauley*. Petitioner’s purpose in producing the images was not incidental or spontaneous, so *McCauley* did not make their production not criminal. *See In re Jones*, 226 F.3d at 333–34; *Bousley*, 523 U.S. at 620–21.

This accords with the Fourth Circuit’s other applications of *Jones*. In *Farkas v. Butner*, 972 F.3d 548 (4th Cir. 2020) (failing second prong), the trial court froze all the petitioner’s assets before trial, which prevented him from securing his choice of counsel, and he was convicted of fraud. 972 F.3d at 551. In a later case, the Circuit held that the criminal forfeiture statute had not authorized the freezing, and the petitioner invoked the savings clause. *Id.* at 552–53. But the court held that the petitioner failed the second prong of *Jones* because there was “no question that Farkas’s illegal conduct—bank fraud, wire fraud, and securities fraud—remains criminal.” *Id.* at 559. In *Hahn v. Moseley*, 931 F.3d 295 (4th Cir. 2019) (passing second prong), the petitioner violated two drug trafficking statutes at once while possessing some firearms, and he was convicted of possessing the firearms in furtherance of trafficking twice, once for each statute. 931 F.3d at 298. In a later case, the Tenth Circuit, whose substantive law controlled the petitioner’s case, *see supra* note 12, held that the firearm statute authorized only one conviction per possession of the same firearms, even where the same conduct violated multiple trafficking statutes. 931 F.3d at 302. The petitioner invoked the savings clause. *Id.* at 300. The Fourth Circuit recognized that the latter case had “introduce[d] a new statutory framework,” announcing “a substantive change

in the law that renders Hahn's firearm possession no longer sufficient to support two § 924(c) convictions." *Id.* at 302. Because this made his second conviction impermissible under the statute, the petitioner passed the second prong of *Jones*. *Id.* at 303.

Here, as in *Farkas*, Petitioner's conduct "remains criminal" under the cases on which he relies. 972 F.3d at 559. *McCauley* only proscribed conviction under the child pornography statute for "a purpose" without more, 983 F.3d at 695–97, and the interest, quantity, knowledge, enjoyment, direction, organization, familiarity, obstruction and consciousness of guilt evidence at Petitioner's trial, to some of which the Court referred in giving its verdict, was plenty more. J.A. 433, 513, 641–44, 660–61, 678–79, 873–74, 1211–12; S.J.A. 142, 149; Trial Tr. at 156–57, 203 (Apr. 20, 2011), ECF No. 149; Trial Tr. at 65–70, 83 (May 6, 2011); Verdict Tr. at 59 (May 12, 2011). And whereas, in *Hahn*, the controlling circuit changed the way it read a statute, and this made the petitioner's second conviction impermissible, 931 F.3d at 302–03, here, Petitioner's convictions remain as proper under *Palomino–Coronado* and *McCauley* as they were before. In short, Petitioner fails the second prong of *Jones* because the cases on which he relies did not announce a new rule of substantive law making his conduct not criminal.

Even if *Palomino–Coronado* or *McCauley* had announced a new rule making Petitioner's conduct not criminal, Petitioner also fails the second *Jones* prong because the new rule has not been made retroactive to cases on collateral review. The law of retroactivity, and especially of the conduct-not-criminal principle, was developed on the *stare decisis* maxim that, unless the announcing court expressly holds a new rule to be retroactive, a trial court may not infer retroactivity for itself. *Cf. Tyler*, 533 U.S. at 662–67 & n.4 ("Multiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule."); *Williams*, 529 U.S. at 380–83; *Teague*, 489 U.S. at 299–316. The *Jones* court, having before it

only conduct already deemed not criminal by the Supreme Court, understandably did not spell this out. *See* 226 F.3d at 334 (“[T]he substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; . . .”). The court likely presumed that anyone applying this prong would know that a change of law must be held retroactive above to become available for collateral attack below. Eighteen years later, the Fourth Circuit spoke more precisely in *Wheeler*, *see supra* note 10, as discussed in *Young*, 982 F.3d 914:

. . . *Wheeler*’s second prong requires that “subsequent to the prisoner’s direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review.” *Wheeler*, 886 F.3d at 429. And “the aforementioned settled substantive law,” that must have “changed” is explained in prong one to be the “settled law of this circuit or the Supreme Court.” *Id.* If neither the Supreme Court nor this Court had applied [the new rule in a given context], the district court could not make that change on its own. Therefore, the district court correctly concluded that, at the time of its decision, the invocation of [the new rule in the given context] was premature.

982 F.3d at 918 (going on to apply the new rule so the petitioner satisfied the prong); *see Ham*, 994 F.3d at 695 n.9 (explaining, “[T]he drastic step taken in *Young*,” i.e., changing substantive circuit law on collateral review, “should be used sparingly in this jurisdictional analysis, and only when a change in Supreme Court precedent necessarily dictates a change in our circuit law”).¹⁴ The history of the law of retroactivity, the facts on which *Jones* was announced, and the Fourth Circuit’s subsequent treatments of similar points suggest that a trial court may not find the second *Jones* prong to be satisfied unless a new rule has been made retroactive to cases on collateral review by the precedential holding of a higher court.

¹⁴ The discussion in *Young* does not apply perfectly here. In *Young*, the context was the Sentencing Guidelines, which had not been before the Supreme Court when it announced a new rule. 982 F.3d at 918. *Young* would better illustrate the point here if the Supreme Court had applied the new rule to the Guidelines but not expressly held the rule retroactive, so the district court could not infer retroactivity for itself. Still, with this disclaimer, the discussion in *Young* supports the general proposition that a trial court should not infer retroactivity absent an express holding from a higher court.

Here, neither *Palomino–Coronado* nor *McCauley* suggested, let alone held, retroactivity. Even if either case had announced a new rule making Petitioner’s conduct not criminal, the new rule has not been made retroactive to cases on collateral review by a holding of the Fourth Circuit or the Supreme Court, so this Court could not find that Petitioner satisfies the second prong of *Jones* here.

For both of the reasons discussed above, Petitioner fails the second prong of *Jones*.

3. Prong Three: “[T]he prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.”

A new rule, “made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” is not enough to certify a second or successive motion at § 2255(h)(2). Under AEDPA, the new rule must be one “of constitutional law.” § 2255(h)(2); *see Slack*, 529 U.S. at 483–84 (giving “due note” to the word “constitutional”). In *Jones*, this requirement would have barred relief although the petitioner was being punished for conduct that the law did not make criminal. 226 F.3d at 332–34. The third prong of *Jones* avoids such a result. *See Wheeler*, 886 F.3d at 430 (explaining habeas “entitles the prisoner to a *meaningful* opportunity” (quoting *Boumediene*, 553 U.S. at 779) (emphasis supplied in *Wheeler*)).

Here, any new rule announced by *Palomino–Coronado* or *McCauley* would interpret a statute, 18 U.S.C. § 2251(a), not the Constitution. *See* § 2255(h)(2); *infra* p. 49. But this is just one of five reasons for which Petitioner “cannot satisfy the gatekeeping provisions at § 2255.” § 2255(h)(2), (f); 226 F.3d at 333–34. Another, more basic reason is that neither *Palomino–Coronado* nor *McCauley* announced a new rule applicable to Petitioner’s convictions. § 2255(h)(2); *see infra* pp. 48–49. A third reason is that any new rule announced by these circuit cases would not have been made retroactive “by the Supreme Court.” § 2255(h)(2); *see infra* pp. 49–51. A fourth is that Petitioner’s argument, never foreclosed by settled law, was not “previously

unavailable.” § 2255(h)(2); *see infra* pp. 51–52. Finally, Petitioner’s Motion is time-barred at § 2255(f). *See infra* pp. 52–53. Each of these reasons is developed further below, *infra* pp. 48–53, and each would suffice to bar Petitioner’s Motion at § 2255(f), (h). At this prong of *Jones*, the sufficiency of these other four reasons establishes that the non-constitutionality of any new rule is not the reason for which Petitioner “cannot satisfy the gatekeeping provisions of § 2255.” *See* 226 F.3d at 333–34. That is, although any new rule announced by *Palomino–Coronado* or *McCauley* would not be “one of constitutional law,” it is not because of this that Petitioner cannot satisfy the provisions. *See id.* Put another way, even if the “new rule” were constitutional, Petitioner would still fail to satisfy the gatekeeping provisions for the other four reasons. Accordingly, Petitioner fails this *Jones* prong.

In *Farkas*, 972 F.3d 548, the petitioner claimed that freezing his assets before trial denied him effective assistance of counsel in violation of the Sixth Amendment. 972 F.3d at 551. The Fourth Circuit explained, “As *Jones* and *Wheeler* respect, § 2255 is not ‘inadequate or ineffective’ for testing constitutional claims.” 972 F.3d at 559. The court “policed the line between *Jones* and *Wheeler*” and dismissed the claim for lack of jurisdiction. *Id.* at 559–60. Here, if Petitioner were challenging his sentence rather than his conviction, he might not fail the broader language at the third prong of *Wheeler*. *See* 886 F.3d at 429 (“[T]he prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; . . .”). But, as *Farkas* made clear, *Jones* and *Wheeler* are “separate tests,” and a petitioner challenging his conviction, rather than his sentence, must pass *Jones*:

[T]hese tests are not one in the same: By design, they each provide a limited exception to the general rule that convicted federal prisoners must challenge their detention through § 2255. Section 2255(e) “provide[s] only the tightest alleyway to relief.” *Lester*, 909 F.3d at 716. In other words, *Wheeler* and *Jones* are not guideposts marking a broad path yet to be cut—each is a narrow, well-delineated trail by which certain petitioners may pursue appropriate relief.

Farkas, 972 F.3d at 560. Here, Petitioner, like the petitioner in *Farkas*, challenges only his convictions, not his sentences, and therefore must pass *Jones*. See 972 F.3d at 560. And here, Petitioner, like the petitioner in *Farkas*, fails the third prong of *Jones*. See *id.* at 559. The petitioner in *Farkas* failed this prong because his claim was constitutional. *Id.* Here, Petitioner fails the prong because, even if his claim were constitutional, § 2255 would still bar his Motion based on four additional reasons. See § 2255(f), (h)(2). Like the petitioner in *Farkas*, Petitioner fails to walk the “narrow, well-delineated trail” of *Jones*, and no new path should be cut for him. See 972 F.3d at 560.

Petitioner fails the final prong of *Jones*.

In conclusion, Petitioner fails each prong of *Jones*. See 226 F.3d at 333–34. Petitioner raised an argument like his current argument at his trial, direct appeal, and first collateral attack, and no settled law made raising it futile. See *Marlowe*, 6 F.4th at 568–73. The case on which Petitioner now relies, *Palomino–Coronado*, 805 F.3d 127, did not announce a new rule. See *Teague*, 489 U.S. at 301. The rule announced by the only other published Fourth Circuit case interpreting “purpose” at § 2251(a), *McCauley*, 983 F.3d 690, did not make Petitioner’s conduct not criminal and has not been made retroactive by the Fourth Circuit or Supreme Court. See *Farkas*, 972 F.3d at 559; *Tyler*, 533 U.S. at 662–67 & n.4. And the “narrow, well-delineated trail” blazed in *Jones* would only avoid one of Petitioner’s five bars to relief at § 2255 (f), (h). See *Farkas*, 972 F.3d at 560. In short, § 2255 itself does not deny Petitioner a meaningful opportunity to raise his argument, see *Wheeler*, 886 F.3d at 430 (citing *Boumediene*, 553 U.S. at 779), and there is no “fundamental defect” here like the one in *Jones*, see 226 F.3d at 333 n.3. See *Marlowe*, 6 F.4th at 570–72; *Braswell*, 952 F.3d at 447–51; *Rice*, 617 F.3d at 807. “It is beyond question that § 2255 is not inadequate or ineffective merely because an individual is unable to obtain relief

under that provision.” *In re Jones*, 226 F.3d at 333. Petitioner fails to establish that § 2255 is inadequate or ineffective to test the legality of his detention. *See Farkas*, 972 F.3d at 553; *Miller*, 261 F.2d at 547. “AEDPA’s strict statutory requirements ‘may not be circumvented through creative pleading.’” *Farkas*, 972 F.3d at 558 (quoting *United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005) (per curiam)). Accordingly, the Court is without jurisdiction to consider Petitioner’s argument at § 2241.¹⁵

Because he cannot proceed at § 2241, Petitioner must proceed, if at all, at § 2255. Having shown that Petitioner cannot evade AEDPA’s procedural bars, this response now shows that neither can he overcome them.

D. Petitioner’s Second or Successive Motion Is Barred at § 2255(h)(2)

On March 13, 2014, Petitioner made his first motion to vacate, set aside or correct sentence. ECF No. 175. On May 29, 2015, the Court, with substantial discussion, denied it, ECF No. 196, and appeals were exhausted on February 21, 2017, 137 S. Ct. 1140 (mem.). On January 26, 2017, Petitioner, pursuant to § 2244, asked the Fourth Circuit for authorization to file a second or successive § 2255 motion. *In re Davison*, No. 17-132, ECF No. 2. The § 2244 motion stated at length Petitioner’s arguments, which relied on a new rule from *Riley*, 573 U.S. 373. *Id.* On March 7, 2017, at the court’s request, Petitioner also filed the § 2255 motion he sought authorization to file with the District Court, restating his *Riley* arguments. *In re Davison*, No. 17-132, ECF No. 6. This motion was made fifteen months after *Palomino–Coronado* was published but did not cite it. Before receiving the § 2255 motion, the Fourth Circuit denied the § 2244 motion without discussion on February 22, 2017. *In re Davison*, No. 17-132, ECF No. 5. On June 7, 2022, relying on *Palomino–Coronado*, 805 F.3d 127, Petitioner filed the instant Motion, styled, “Petition for

¹⁵ See *supra* note 9. If the Court were to determine that § 2241 were available to Petitioner, the Court would go on to analyze his Motion under equitable and prudential precedent. *See infra* pp. 53–68; *Walker*, 820 F. Supp. 2d at 715.

Applicant Details

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 Middle Initial **N**
 Last Name **Williams**
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Applicant Education

BA/BS From **University of Texas-Austin**
 Date of BA/BS **May 2016**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 20, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Review of Law and Social Change**
 Moot Court Experience **Yes**
 Moot Court Name(s) **NYU Law Marden Moot Court Competition**
National BALSA Thurgood Marshall Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/
 Externships **Yes**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers beginning in 2024. I am a third-year student at New York University School of Law attending on a scholarship through the Filomen M. D'Agostino Scholarship for Civil Rights, Civil Liberties, and Justice.

At NYU, I have actively engaged in extracurricular activities that have enhanced my legal skills and contributed to my personal growth. As a member of the Black Allied Law Student Association and Trial Advocacy Society, I have gained valuable experience in advocacy, leadership, and fostering diversity within the legal profession. Further, I revived the NYU Native American Law Student Association (NALSA) chapter after nearly a decade of dormancy and now serve as its Chair, where I advocate for the rights of Native American students and organize impactful events.

I have also demonstrated my commitment to academic excellence and legal research. As a Staff Editor for the Review of Law and Social Change, I honed my writing and analytical skills while ensuring the publication of high-quality legal scholarship. Additionally, as a Research Assistant for Professor Deborah Archer, I conducted extensive research on the history of racial segregation in transportation infrastructure, producing well-written memoranda that contributed to the understanding of complex legal issues. While participating in the Civil Rights Clinic, I collaborated with project teams, conducted legal research, and drafted numerous memoranda. These experiences have strengthened my ability to analyze complex legal issues, provide insightful recommendations, and meet deadlines while maintaining attention to detail and organization.

I believe that my diverse background and personal experiences would significantly contribute to my qualifications for a clerkship in your chambers. As the first person in my family to attend college and as a Citizen of Cherokee Nation and a descendant of Cherokee Freedmen, I have overcome significant challenges and developed a deep appreciation for the law's impact.

I have attached a resume, transcripts, and a writing sample. Please let me know if any other information might be helpful. Arriving separately are three letters of recommendation from Professors Deborah Archer, Emma Kaufman, and Elizabeth Chen.

I would welcome the opportunity to interview with you, and I thank you for your consideration.

Respectfully,

Ashley Nicole Williams

ASHLEY NICOLE WILLIAMS

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW

Honors: Filomen M. D'Agostino Scholarships in Civil Rights, *Recipient*
Journal of Law & Social Change, *Staff Editor*
Activities: Native American Law Student Association, *Chair*
Black Allied Law Student Association, *Member*
Trial Advocacy Society Activity, *Member*
NYU Clerkship Diversity Program, *Participant*
Professor Deborah N. Archer, *Research Assistant*
Civil Rights Clinic, *Student*

NEW YORK, NY
Candidate for J.D., May 2024

UNIVERSITY OF CALIFORNIA LOS ANGELES

Master of Social Science
Research: Inequitable outcomes in online home mortgage lending for Black and Brown borrowers

LOS ANGELES, CA
June 2018

UNIVERSITY OF TEXAS AT AUSTIN

Bachelor of Business Administration: Canfield Business Honors Program, Finance
Bachelor of Arts: African and African Diaspora Studies
Activities: Black Business Student Association, *President, Financial Director, Fundraising Chair*
Delta Xi Chapter of Alpha Kappa Alpha Sorority, Inc., *Membership Intake Chair, Treasurer*
Study Abroad: University of Cape Town, South Africa, Summer 2014

AUSTIN, TX
May 2016

EXPERIENCE

ARNOLD & PORTER

Summer Associate

- Conduct research and document review to prepare memoranda for projects in White Collar, Complex Litigation, and Appellate practice groups.

Washington, D.C.
May 2023-July 2023

THE HONORABLE LESHANN DEARCY HALL, US DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Judicial Intern

- Conducted research, produced memoranda, and presented findings to the Judge regarding legal matters including *pro se* rights post-trial and an employment law matter at the motion to dismiss stage.

Brooklyn, NY
May 2022-August 2022

JONES DAY

SEO Summer Associate

- Completed successful assignments in Global Disputes, Tax, Financial Markets, and Government Affairs including two memoranda.
- Selected to travel to Laredo, Texas to support the Firm's pro bono efforts in assisting asylum seekers at the Texas border.

Washington, D.C.
June 2021-August 2021

CENTER FOR PUBLIC POLICY PRIORITIES

Policy Analyst and Advocate, Economic Opportunity Team; Program Lead, Policy Leaders of Tomorrow Fellowship.

- Drafted, secured sponsorship, and advocated for a bill to allow high scores on high school equivalency exams to count for state college readiness standards; signed into law June 2019.
- Co-led the advocacy effort to prevent Texans who default on student debt from losing professional licenses; signed into law June 2019.
- Awarded \$500,000 dedicated grant funds to envision, develop, and execute a policy pipeline program for historically underrepresented students.
- Elected as lead negotiator for the workplace union's inaugural contract: piloted the creation of a 100+ page contract, engaged in 20+ rigorous negotiation sessions with management and their legal counsel, and secured agreement on significant improvements in workplace policy.
- Publications & Appearances: Texas Tribune Festival: *This Way Up: Higher Education Panel*; Texas Tribune Event: *Higher Ed & Social Mobility*; NPR Interview: *Why Texas Historically Black Colleges Receive Less Funding*; Peer-Reviewed Publication - Texas Education Review: *A Review of State Investment in Higher Education During the 86th Legislature*.

Austin, TX
August 2018-May 2021

EAST AVENUE PROJECT ON SEGREGATION

Research Analyst

- Conducted 50+ in-person surveys of current/previous residents of communities experiencing gentrification in Austin.
- Nominated by program director to present related findings of independent research at UT Austin Peace and Justice Summit to an audience of 75.

Austin, TX
January 2016-April 2016

LEADERSHIP EXPERIENCE & AFFILIATIONS

SPONSORS FOR EDUCATIONAL OPPORTUNITY

SEO Law and SEO Catalyst Participant

- Selected from a competitive applicant pool to engage in a rigorous curriculum focused on developing legal skills and career preparation.

REMOTE
August 2020 – August 2021

TEXAS POSTSECONDARY ADVOCATES COALITION FOR EQUITY (TEXAS PACE)

Founder, Lead

- Founded a coalition of equity-focused advocates focused on promoting access to higher education for underrepresented populations.

AUSTIN, TX
October 2018-May 2021

INTERESTS: Instructor and student of hip hop and jazz dance, Portrait photography, Contemporary African American literature

Name: Ashley N Williams
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 Page: 1 of 1

New York University
 Beginning of School of Law Record

Fall 2021

Instructor: Deborah Archer
 Civil Rights Clinic Joseph Schottenfeld LAW-LW 10627 3.0 A
 Instructor: Deborah Archer
 Supreme Court Simulation Seminar Joseph Schottenfeld LAW-LW 11112 3.0 A-
 Instructor: Troy A McKenzie
 Jack L Millman
 Current AHRS EHRS
 Cumulative 14.0 14.0
 Staff Editor - Review of Law & Social Change 2022-2023 57.0 57.0
 End of School of Law Record

School of Law
 Juris Doctor
 Major: Law
 Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Elizabeth J Chen
 Criminal Law LAW-LW 11147 4.0 B
 Instructor: Rachel E Barkow
 Torts LAW-LW 11275 4.0 B+
 Instructor: Christopher Jon Sprigman
 Procedure LAW-LW 11650 5.0 B-
 Instructor: Samuel Issacharoff
 1L Reading Group LAW-LW 12339 0.0 CR
 Instructor: Samuel Estreicher
 Zachary Dean Fasman
 AHRS EHRS
 Current 15.5 15.5
 Cumulative 15.5 15.5

Spring 2022

School of Law
 Juris Doctor
 Major: Law
 Constitutional Law LAW-LW 10598 4.0 B
 Instructor: Melissa E Murray
 Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Elizabeth J Chen
 Legislation and the Regulatory State LAW-LW 10925 4.0 B
 Instructor: Emma M Kaufman
 Contracts LAW-LW 11672 4.0 B
 Instructor: Liam B Murphy
 AHRS EHRS
 Current 14.5 14.5
 Cumulative 30.0 30.0

Fall 2022

School of Law
 Juris Doctor
 Major: Law
 Civil Rights LAW-LW 10265 4.0 CR
 Instructor: Baher A Azmy
 Corporations LAW-LW 10644 4.0 B
 Instructor: Ryan J Bubb
 Professional Responsibility and the Regulation of Lawyers LAW-LW 11479 2.0 B+
 Instructor: Geoffrey P Miller
 Orison S. Marden Moot Court Competition LAW-LW 11554 1.0 CR
 Teaching Assistant LAW-LW 11608 2.0 CR
 Instructor: Alba Raquel Morales
 AHRS EHRS
 Current 13.0 13.0
 Cumulative 43.0 43.0

Spring 2023

School of Law
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 Major: Law
 Criminal Procedure: Post Conviction LAW-LW 10104 4.0 A
 Instructor: Emma M Kaufman
 Civil Rights Clinic Seminar LAW-LW 10559 4.0 A-

THE UNIVERSITY OF TEXAS AT AUSTIN

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OFFICIAL TRANSCRIPT

NAME: WILLIAMS, ASHLEY NICOLE

STUDENT ID: XXX-XX-1587

DATE: 12/11/16

DOB: 06/26/93

PAGE: 4

ASHLEY N WILLIAMS
1615 SAWDUST RD.
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THE WOODLANDS TX 77380

DEGREES AWARDED BY THE UNIVERSITY OF TEXAS AT AUSTIN:

DEGREE: BACHELOR OF BUSINESS ADMINISTRATION
DATE: MAY 21, 2016
MAJOR: HONORS PLAN

DEGREE: BACHELOR OF ARTS
DATE: MAY 21, 2016
MAJOR: AFRICAN AND AFRICAN DIASPORA STUDIES
FINANCE

HIGH SCHOOL: DR JOHN D HORN HIGH SCHOOL
MESQUITE TX

CLASS OF 2012

ATTENDED: DALLAS COUNTY COMMUNITY COLLEGE DISTRICT

SUMMER 2010 WINTER 2016

DATE	ORIGINAL	COURSE DESIGNATION	GR/CR	UT EQUIVALENT
SUMMER, 2010	SPCH 1311	SPEECH COMMUNICATION	A 3	CMS 3 HRS 3
SUMMER, 2011	ECON 2301	MACROECONOMICS	A 3	ECO 304L 3
SPRING, 2013	ECON 2302	MICROECONOMICS	A 3	ECO 304K 3
SUMMER, 2013	HIST 1301	U.S. HISTORY 1	A 3	HIS 315K 3
SUMMER, 2013	MATH 2414	CALCULUS 2	A 4	M 408L 4
SPRING, 2014	GOVT 2305	FEDERAL GOVERNMENT	A 3	GOV 3 U S 3
SUMMER, 2014	SPAN 1411	SPANISH 1	B 4	SPN 406 4
SUMMER, 2015	SPAN 1412	SPANISH 2	A 4	SPN 407 4
SUMMER, 2015	SPAN 2311	SPANISH 3	A 3	SPN 312K 3
WINTER, 2016	SPAN 2312	SPANISH 4	A 3	SPN 312L 3

TOTAL HOURS TRANSFERRED: 33

COURSEWORK UNDERTAKEN AT THE UNIVERSITY OF TEXAS AT AUSTIN

FALL SEMESTER 2012	CREDIT BY EXAM		
E 316K	MASTERWORKS OF LITERATURE	3.0	CR
RHE 306	RHETORIC AND WRITING	3.0	CR

FALL SEMESTER 2012	BUSINESS ADMIN.		
B A 101H	PROF DEVEL & CAREER PLAN: HON	1.0	A
B A 324H	BUSN COMM: ORAL & WRITTEN-HON	3.0	A-
SOC 308	CONTEMP US SOCIAL PROBLEMS	3.0	A



Shelby Stanfield

Shelby Stanfield, Registrar

MORE WORK ON NEXT PAGE

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THE UNIVERSITY OF TEXAS AT AUSTIN

OFFICE OF THE REGISTRAR, MAIN BLDG. ROOM 1, AUSTIN, TX 78712-1157, (512) 475-7575

FICE CODE: 3658

IPEDS CODE: 228778

ATP CODE: 6882

ACT CODE: 4240

OFFICIAL TRANSCRIPT

NAME: WILLIAMS, ASHLEY NICOLE

STUDENT ID: XXX-XX-1587
DOB: 09/26/93DATE: 12/11/16
PAGE: 2

CONTINUE FALL SEMESTER 2012

M 408K	DIFFERENTIAL CALCULUS	4.0	B
UGS 302	US RELIGION AND POLITICS	3.0	A-
HRS UNDERTAKEN 14	HRS PASSED 14	GPA HRS 14	GR PTS 50.02
UNIVERSITY HONORS FALL SEMESTER 2012			

SPRING SEMESTER 2013 CREDIT BY EXAM

GOV 310L	AMERICAN GOVERNMENT	3.0	CR
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SPRING SEMESTER 2013 BUSINESS ADMIN.

MIS 301H	INTRO INFO TECH MGMT: HONORS	3.0	B
AMS 310	INTRO TO AMERICAN STUDIES	3.0	B
ANT 304	INTRO ARY STDS I: PREHIST ARY	3.0	A
CH 304K	CHEMISTRY IN CONTEXT I	3.0	A
M 408L	INTEGRAL CALCULUS	4.0	Q
HRS UNDERTAKEN 12	HRS PASSED 12	GPA HRS 12	GR PTS 42.00
GPA 3.5000			

FALL SEMESTER 2013 BUSINESS ADMIN.

B A 151H	HONORS LYCEUM IN BUSN ADMIN	1.0	A
ACC 311H	FUNDMNTLS OF FINANCIAL ACC-HON	3.0	B+
FIN 179C	INDEPENDENT RSCH IN FINANCE	1.0	A
STA 309H	ELEM BUSINESS STATISTICS-HON	3.0	B
AFR 317C	PEOPLES AND CULTURES OF AFRICA	3.0	B
AFR 317D	3-THE BLACK POWER MOVEMENT	3.0	CR
AFR 374D	MINORITY STUDENT LEADRSHIP ISS	3.0	A
HRS UNDERTAKEN 17	HRS PASSED 17	GPA HRS 14	GR PTS 47.99
GPA 3.4278			

SPRING SEMESTER 2014 BUSINESS ADMIN.

ACC 312H	FUNDMNTL OF MANAGERIAL ACC-HON	3.0	B-
STA 375H	STAT/MODLNG FOR FINANCE: HONOR	3.0	B+
AFR 303	INTRO AFR/AFR DIASPORA STUDIES	3.0	A
AFR 372F	RACE IN THE LAW	3.0	A
AFR 374C	MANDELA:THE MAN & HIS POLITICS	3.0	A-
AFR 374D	PSYCHOL OF AFR AMER EXPERIENCE	3.0	A
HIS 317L	URBAN ECON DEVELOPMENT-RSA	3.0	A
HRS UNDERTAKEN 21	HRS PASSED 21	GPA HRS 21	GR PTS 77.01
GPA 3.6671			
UNIVERSITY HONORS SPRING SEMESTER 2014			

FALL SEMESTER 2014 BUSINESS ADMIN.

FIN 353	INTERNSHIP IN FINANCE	3.0	CR
FIN 357H	BUSINESS FINANCE-HONORS	3.0	A-
AFR 301	AFRICAN AMERICAN CULTURE	3.0	A
AFR 356E	BLACK WOMEN AND DANCE	3.0	A
AFR 372F	13-URBAN UNREST	3.0	A
HRS UNDERTAKEN 15	HRS PASSED 15	GPA HRS 12	GR PTS 47.01
GPA 3.9175			
UNIVERSITY HONORS FALL SEMESTER 2014			

SPRING SEMESTER 2015 BUSINESS ADMIN.

ACC 326	FINANCIAL ACC-INTERMEDIATE	3.0	Q
FIN 374C	FINCL PLAN & POL FOR LRG CORPS	3.0	A-
MAN 336H	ORGANIZATNL BEHAVIOR-HONORS	3.0	B+
MKT 337H	PRINCIPLES OF MARKETING-HONORS	3.0	A-
AFR 372D	POLITICS OF BLACK EDUCATION	3.0	A

MORE WORK ON NEXT PAGE



Shelby Stanfield
Shelby Stanfield, Registrar

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DOB: 09/26/99

PAGE: 3

CONTINUE SPRING SEMESTER 2015

LIBERAL ARTS

HRS UNDERTAKEN 12 HRS PASSED 12 GPA HRS 12 GR PTS 44.01 GPA 3.6675

FALL SEMESTER 2015

BUSINESS ADMIN.

LIBERAL ARTS

ACC 326 FINANCIAL ACC-INTERMEDIATE 3.0 C+

FIN 367 INVESTMENT MANAGEMENT 3.0 B

FIN 371M MONEY AND CAPITAL MARKETS 3.0 B-

O M 335H OPERATIONS MANAGEMENT: HONORS 3.0 C

MAN 374H GENERAL MGMT & STRATEGY: HON 3.0 A-

CH 305 CHEMISTRY IN CONTEXT II 3.0 B

HRS UNDERTAKEN 18 HRS PASSED 18 GPA HRS 18 GR PTS 50.01 GPA 2.7783

SPRING SEMESTER 2016

BUSINESS ADMIN.

LIBERAL ARTS

LEB 323H BUSINESS LAW AND ETHICS: HON 3.0 A

FIN 370 INTEGRATIVE FINANCE 3.0 A-

FIN 372 VALUATION OF ENERGY INVESTMENT 3.0 B+

R E 358 INTRO R ESTATE/URB LAND DEV 3.0 A

AFR 375 COMMUNITY INTERNSHIP 3.0 A

AFR 376 SENIOR SEMINAR 3.0 A-

HRS UNDERTAKEN 18 HRS PASSED 18 GPA HRS 18 GR PTS 68.01 GPA 3.7783

UNIVERSITY HONORS SPRING SEMESTER 2016

CUMULATIVE TOTALS EARNED AS AN UNDERGRADUATE STUDENT AT U.T. AUSTIN

HRS UNDERTAKEN 136 HRS PASSED 136 GPA HRS 121 GR PTS 426.06 GPA 3.5211

*** END OF TRANSCRIPT ***

TSI STATUS INFORMATION

TSI AREA	TSI STATUS	EXPLANATION
ALL	EXEMPT	SAT/ACT/TAAS/TAKS

TEC 51.907 UNDERGRADUATE COURSE DROP COUNTER: X

CORE CURRICULUM SUMMARY

CORE CURRICULUM COMPLETE



Shelby Stanfield

Shelby Stanfield, Registrar

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University of California, Los Angeles

GRADUATE Student Copy Transcript Report

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Student Information

Name: WILLIAMS, ASHLEY NICOLE
 UCLA ID: 905065280
 Date of Birth: 09/26/XXXX
 Version: 08/2014 | SAITONE
 Generation Date: April 08, 2018 | 01:28:59 PM
 This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 09/25/2017
 GRADUATE DIVISION

Major:
 SOCIAL SCIENCE

Degrees | Certificates Awarded

None Awarded

Previous Degrees

None Reported

Fall Quarter 2017

Major:
 SOCIAL SCIENCE

RESEARCH&PERSPECTVS	SOC SC 400A	4.0	16.0	A	
QUAL RESEARCH MTHDS	SOC SC 401	4.0	16.0	A	
QUANT DATA ANALYSIS	SOC SC 402	4.0	16.0	A	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		12.0	12.0	48.0	4.000

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Winter Quarter 2018

ETHNICITY-US CITY	GEOG 144	4.0	16.0	A	
RESEARCH&PERSPECTVS	SOC SC 400B	4.0	16.0	A	
QUANT EVIDENCE&ANLY	SOC SC 403	4.0	16.0	A	
	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>	
	Term Total	12.0	12.0	48.0	4.000

Spring Quarter 2018

*** Courses In Progress ***

ENGAGED SOCIAL SCI	SOC SC 410	4.0		
RSRCH DSGN ANALYSIS	SOC SC 420	4.0		
SPCL TPC-PLNNG MTHD	URBN PL 229	4.0		
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>
	Term Total	0.0	0.0	0.000

GRADUATE Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Satisfactory/Unsatisfactory Total	0.0	0.0	N/a	N/a
Graded Total	24.0	24.0	N/a	N/a
Cumulative Total	24.0	24.0	96.0	4.000
Total Completed Units	24.0			

END OF RECORD
NO ENTRIES BELOW THIS LINE



EMMA KAUFMAN
Assistant Professor of Law

NYU School of Law
40 Washington Square South, 334
New York, NY 10012
P: 212 998 6250
emma.kaufman@nyu.edu

Dear Judge:

I'm writing to recommend my student, Ashley Williams, who has applied for a clerkship in your chambers. Ashley is an extraordinary person and a bright student. I'm delighted to endorse her application.

I'll say more below, but here are some highlights. Ashley grew up in Tulsa, Oklahoma. She is the first person in her family to attend college, and she received a master's degree at UCLA before coming to law school. She is a student leader at NYU: an active member of the Black Law Students Association; leader of the school's Native American Law Student Association; and an engaged participant in the classroom. Ashley is also a determined person, who navigated a brain tumor and provides financial support to her family. And she is an outstanding law student, who just earned an A in my very difficult, upper-level constitutional criminal procedure course.

I first met Ashley when she was a student in my 1L course, Legislation and the Regulatory State (LRS). LRS, which is a required first-year course at NYU, can be challenging for many students. It is a crash course in statutory interpretation, structural constitutional law, and administrative law, full of unsettled doctrine and recent Supreme Court cases. Ashley was not intimidated. She spoke often—not too much, but enough to make my job easier and the students around her feel more comfortable exploring new ideas.

Given her performance in LRS, I was thrilled when Ashley enrolled in my constitutional criminal procedure class this spring. My criminal procedure course is atypical. Rather than focusing on policing or criminal adjudication, it surveys post-conviction constitutional criminal law. The material is daunting, and the class has significant overlap with Federal Courts. (For example, we cover sovereign immunity, qualified immunity, the boundary between habeas and Section 1983, and the standards for modification and termination of consent decrees.) My class is hard enough that only serious students enroll; and it's doctrinal enough to teach me a great deal about students' capacity as lawyers and promise as law clerks.

Ashley rose to the occasion. She was a confident and curious participant in the class, which is saying something given how politically sensitive material about incarceration can be. In a room where students often agreed with each other, Ashley questioned assumptions, including her own. She was thoughtful—never dogmatic and always open to new ideas. Really, a model student.

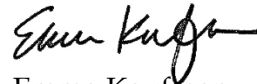
She also crushed the exam. I grade my students anonymously on a strict curve, reserving As for those who have a complete understanding of the doctrine and excellent writing skills.

Ashley's exam was among the very best. She knew the material cold and earned a top grade in a course filled with motivated, upper-level students.

In short, Ashley is a lightning bolt, who has let neither personal adversity nor challenging doctrine deter her. She has the legal skills to be an excellent law clerk and the sort of personality that will make chambers a happier and smoother place to work. I know Ashley would learn a tremendous amount from working for you, and I hope you'll take a serious look at her application.

Please do not hesitate to reach out if I can offer any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Emma Kaufman", with a stylized flourish at the end.

Emma Kaufman
Assistant Professor of Law
New York University School of Law



DEBORAH N. ARCHER
Associate Dean, Experiential Education & Clinical Programs
Professor of Clinical Law

NYU School of Law
245 Sullivan Street, 610
New York, New York 10012

P: 212 998 6528
F: 212 995 4031

deborah.archer@nyu.edu

June 20, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Ashley Williams

Dear Judge Walker:

I am Associate Dean for Experiential Education and Clinical Programs and Professor of Clinical Law at NYU School of Law. I am also President of the ACLU. I am writing to strongly recommend Ashley Williams for a judicial clerkship in your chambers. I have had the pleasure of working closely with Ashley in various capacities, including as my research assistant and under my direct supervision in the Civil Rights Clinic. Ashley is intelligent, skilled, and a pleasure to work with. You could not ask for more in a law clerk!

This academic year, Ashley has served as my research assistant, which has given me the opportunity to witness first-hand what a valuable asset she will be to any judge's chambers. She is extremely hard-working, curious, and displays a strong attention to detail. I have come to trust her completely. My responsibilities within the law school and externally often require me to balance numerous urgent responsibilities. Ashley has become adept at organizing and executing the many tasks that I send her way in an efficient and timely manner. Whether writing a detailed research memo on an education, housing, or environmental justice matter, or distilling complex legal issues in preparation for a presentation, no task has been too big or too small for Ashley to tackle. And she consistently brings something new and insightful to the work with her creative and rigorous thinking.

Ashley was also a student in the Civil Rights Clinic, which I teach. The Civil Rights Clinic provides students with the opportunity to work on a wide range of civil rights and social justice matters through direct client representation, appellate advocacy, and the development of advocacy campaigns. Selection is highly competitive, and Ashley was one of only ten students selected for the Clinic from a pool of over one hundred applicants. From the first class, Ashley has been a star. Her work has been creative, and she has demonstrated compassion and profound empathy for her clients and their needs. Ashley's ability to analyze complex legal issues and provide insightful recommendations was instrumental in our work together.

In all of her work, Ashley explored different litigation and policy options, conducting extensive legal research into different potential claims and strategizing with litigation partners and other students to determine the best courses of action. This demands not only diligent attention to detail but also creativity and teamwork. Ashley was enthusiastic about conducting research to determine which advocacy options were the most promising. With little initial information, Ashley and her colleagues in the clinic developed a sophisticated understanding of the economic and political realities on the ground. I was especially impressed by Ashley's diligence in developing mastery of the facts. Months later, when drafting advocacy letters and pleadings, she deftly incorporated relevant details with the legal framework.

Ashley is also a passionate student leader. As a first-year law student, Ashley revived the NYU Native American Law Students Association (NALSA) chapter after the organization was dormant for nearly a decade. As the Chair of NALSA, she has effectively advocated for the rights of Native American students and worked tirelessly to create a supportive environment for underrepresented groups. The organization's first year under Ashley's leadership culminated in a symposium that brought together leading Indigenous legal scholars, activists, and students in partnership with numerous campus organizations and the Center on Race Inequality and the Law. Ashley's involvement in NALSA and other organizations demonstrates her commitment to fostering diversity within the legal profession. Her ability to convene, facilitate meaningful discussions, and inspire others to act is truly commendable.

Beyond her academic and leadership achievements, Ashley's personal background is also noteworthy. As the first person in her family to attend college, she has overcome significant challenges and has proven to be resilient and determined. This background has undoubtedly shaped the unique perspective she would bring to your chambers. Furthermore, as a Citizen of Cherokee Nation and a descendent of Cherokee Freedmen, Ashley's identity at the intersection of Blackness and Indigeneity has allowed her, through lived experience, to gain an appreciation for complex legal issues and a deep appreciation for the impact of the law.

I wholeheartedly recommend Ashley Williams for a clerkship in your chambers. Ashley's achievements, both in and outside of academia, as well as her personal background, attest to her exceptional qualities and potential as a judicial clerk. I am confident she will bring immense value to any chambers she joins. Please do not hesitate to contact me if you require any further

Deborah Archer - deborah.archer@nyu.edu - 212-998-6528

information.

Sincerely,

Deborah N. Archer
Professor of Clinical Law

Deborah Archer - deborah.archer@nyu.edu - 212-998-6528



Brooklyn Law School
ESTABLISHED 1901

June 12, 2023

RE: Ashley Williams, NYU Law '24

Your Honor:

Ashley Williams is an exceptional law student and will be an outstanding judicial clerk. I write to recommend her for a clerkship in the strongest possible terms. As Ashley's professor in the first-year Lawyering Program at NYU School of Law, I had an opportunity to observe Ashley both in class and in a variety of simulations that expose students to diverse professional and interpersonal skills. As a former law clerk, I know that Ashley possesses both the skills and the demeanor to be an asset to your chambers.

The Lawyering Program, a key part of the first-year JD curriculum at NYU, is a year-long, simulation-based course with approximately 28 students per class. In this course, students operate within small teams, critique each other's work, and receive detailed feedback on a range of skills, including conducting legal research and factual due diligence, drafting objective memoranda and persuasive briefs, interviewing and counseling clients, and oral advocacy.

Ashley's performance as a student in my class was exemplary. Ashley is a highly perceptive, inquisitive, and self-motivated learner who possesses excellent critical thinking and legal reasoning skills.

Ashley's written work is particularly remarkable. Both her predictive memos and her persuasive briefs reflect comprehensive research and an unusual ability to navigate subtle legal distinctions and nuanced details. She is also adept at telling persuasive legal and factual narratives. Ashley entered law school as a top-notch writer, and quickly took to the specifics of legal analysis and writing, incorporating strong reasoning by analogy, using declarative language, and grounding her argumentation in case law. And unlike many law students, Ashley has retained beauty and fluidity in her writing, leading to arguments that are both compelling and enjoyable to read.

Ashley also contributed significantly to classroom discussions and simulations. Ashley regularly surfaced important issues related to power and the law, and helped to create a welcoming environment in which other students felt comfortable sharing their own perspectives. In our client-based simulations, Ashley demonstrated an outstanding ability to build rapport, empower her clients, and provide candid legal advice. For example, in a simulated interview with a client who faced workplace discrimination due to her status as a mother, Ashley was able to learn far more information than other students because of the bond that she formed with the

Ashley Williams, NYU Law '24

June 12, 2023

Page 2

client and her intuitive ability to make people feel comfortable sharing challenging information. For our capstone project, Ashley thrived in the oral argument context, providing deft answers to questions and making her client's case in a respectful and effective manner.

Finally, Ashley approached the learning process with a level of maturity and humility rare in first year students. A key element of my course involves self-reflection and consideration of supervisor feedback to encourage students both to feel more confident in the work product they submit it, and to understand how to improve it after. Over the course of the year, Ashley became increasingly confident in her work product, and took the time to incorporate feedback and critique to continually improve her work.

On a more personal note, Ashley is a joy to work with and will make an excellent colleague. Ashley has always taken advantage of opportunities to meet with me one-on-one for mentorship and career advice even as I transitioned from NYU to Brooklyn Law, and I have delighted in watching her crystalize her plans to use her law degree to advance American Indian rights. I encouraged her to apply to NYU's Clerkship Diversity program and was thrilled to hear that not only had she been accepted into the program, but also that she had secured an internship in the Eastern District of New York after her first year of law school. Her commitment to becoming the strongest possible advocate and willingness to place herself in new and unfamiliar environments to pursuit of those goals is a delight to see. Ashley is thoughtful, mature, and generous of spirit, and I am confident that she will thrive in the intimate setting of a judge's chambers.

If selected for a judicial clerkship, I know that Ashley will provide excellent service to the Court, take full advantage of the learning opportunities afforded to clerks, and use her position to help elevate others whose backgrounds are, like hers, less commonly reflected in the legal profession. I recommend Ashley for a clerkship in the strongest possible terms. If I can be of any further assistance in your deliberations, please do not hesitate to contact me at 914-649-3928 or elizabeth.chen@brooklaw.edu.

Sincerely,

/s/

Elizabeth Chen
Visiting Assistant Professor of Legal Writing
Brooklyn Law School

APRIL 2023 WRITING SAMPLE

Ashley N. Williams
anw2059@nyu.edu

The attached document was prepared for the Supreme Court Simulation Seminar where I was instructed to prepare a bench memorandum summarizing the background, key issues, and principal arguments presented by the parties in a case. This writing sample is my independent work after receiving minimal edits.

BENCH MEMORANDUM

To: Dean Troy McKenzie, Professor Jack Millman
 From: Ashley Williams
 Date: April 5, 2023
 Case Name: *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*
 No.: 22-227
 Cert. To.: U.S. Court of Appeals for the First Circuit

QUESTION PRESENTED: Whether the Bankruptcy Code unequivocally abrogates tribal sovereign immunity.

CITATION TO OPINIONS BELOW: The opinion for the United States Court of Appeals for the First Circuit is reported at 33 F.4th 600. The memorandum of decision and order of the Bankruptcy Court is reported at 622 B.R. 491.

I. RELEVANT STATUTORY PROVISIONS

At issue in this case is Section 106(a) of Title 11 of the U.S. Code, which provides for waivers of sovereign immunity.

“Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.” 11 U.S.C. § 106(a).

Further, Section 101(27) defines a governmental unit.

“The term “governmental unit” means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” 11 USC § 101(27).

II. BACKGROUND AND PROCEDURAL HISTORY

This case arises at the intersection of the Bankruptcy Code and long-recognized tribal sovereign immunity. Section 106(a) lists the sections of the Bankruptcy Code where sovereign

immunity is abrogated. 11 U.S.C. § 106(a). Further, Section 101(27) defines the specific governmental units included in that abrogation. 11 USC § 101(27).

Congress defined a “governmental unit” in the original Bankruptcy Code (at the same time that it first enacted the abrogation provision). Pet’r’s Br. at 5 (citing Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 101(21), 106, 92 Stat. 2549, 2552, 2555-2556).

The language of Section 101(27) is critical in this case because this Court’s precedent requires that, in order to abrogate tribal sovereign immunity, Congress must express its intent to do so unequivocally. *Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). This court has long held that “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories. *Id.* Because Indian Tribes¹ are “separate sovereigns pre-existing the Constitution,” they “have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Suits against Indian tribes are thus barred by sovereign immunity absent a **clear waiver** by the tribe or congressional abrogation.” *Okla. Tax Commn.*, 498 U.S. 505 at 509 (internal citations omitted) (emphasis added).

A. Parties to the Proceeding

The parties to this case are Petitioners Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. (hereinafter “the Band”) and Respondent Brian W. Coughlin (hereinafter “Mr. Coughlin”). The Band is a federally recognized tribe that “wholly owns L.D.F. Business Development Corporation; L.D.F. Business Development Corporation wholly owns L.D.F.

¹ I will use the terms “Indian” and “Indian tribe” herein to match the language of the law, but I recognize that the terms “Indigenous” or “Native American” are considered more appropriate terms in other contexts.

Holdings, LLC; and L.D.F. Holdings, LLC wholly owns Niiwin, LLC, d/b/a Lendgreen.” Pet’r’s Br. iii.

The Band’s subsidiary, Lendgreen, provides short-term financing to consumers. *Id.* at 6. It is one of many businesses operated by the Band to “generate revenue essential to funding tribal services and programs.” *Id.* at 6.

B. Procedural History

On December 4, 2019, Brian Coughlin filed a Chapter 13 petition and listed among his debts \$1,600 owed to Lendgreen. *In re Coughlin*, 622 B.R. 491, 492 (Bankr. D. Mass. 2020). Mr. Coughlin claimed that after filing his petition, he provided written notice to the Band, who allegedly “continued to send him emails and to make telephone calls to him seeking payment of a so-called payday loan they made to him prepetition.” *Id.* Mr. Coughlin also claimed that he was “so emotionally upset by the continued collection activities that he suffered depression, anxiety, and suicidal ideation, resulting in catastrophic damages.” *Id.* at 492–93. Mr. Coughlin filed a motion to recover for alleged violations of the automatic stay provision of 11 U.S.C. § 362. *Id.* at 492.

The Band “hotly disputed” that it was in violation of the stay. *Id.* Further, the Band filed a motion to dismiss, arguing that the court lacks “subject matter jurisdiction in this dispute because, as a sovereign nation, they are immune from suit” in that court.” *Id.* at 493. Bankruptcy Court Judge Frank J. Bailey granted the Band’s motion to dismiss.

On direct appeal from that decision, the United States Court of Appeals for the First Circuit reversed. *In re Coughlin*, 33 F.4th 600, 604 (1st Cir. 2022). The three-judge panel included Chief Judge Barron, Circuit Judge Lynch, and District Judge Burroughs. *See Id.*

III. OPINION BELOW

Writing for the two-judge majority, Judge Lynch acknowledges the existing circuit split on the question of whether the Bankruptcy Code abrogates tribal sovereign immunity. The Sixth Circuit held in *In re Greektown Holdings* that Congress *did not* unequivocally abrogate tribal sovereign immunity in the Bankruptcy Code. *In re Greektown Holdings, LLC*, 917 F.3d 451, 460 (6th Cir. 2019). In contrast, the Ninth Circuit held in *Krystal Energy* that Congress spoke unequivocally and did abrogate tribal sovereign immunity with respect to the Bankruptcy Code. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004). The First Circuit, consistent with the Ninth Circuit, held below that the Bankruptcy Code unequivocally strips tribes of their immunity. *In re Coughlin*, 33 F.4th 600, 603 (1st Cir. 2022).

The First Circuit acknowledges the “enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Id.* at 605. It turns first to a textual analysis of Section 106(a) and focuses on “whether Congress intended to abrogate tribal sovereign immunity when it used the phrase ‘governmental unit.’” *Id.* A “governmental unit” is further defined in Section 101(27) of the Code, and the court focuses on the “or other foreign or domestic government” language therein. *Id.*

The panel majority states that there is no real disagreement that a tribe is a government and supports this assertion with dictionary definitions. *Id.* The majority states that “it is also clear that tribes are domestic, rather than foreign because they ‘belong[] or occur[] within the sphere of authority or control or the . . . boundaries of’ the United States.” *Id.* at 606 (citing the Webster’s dictionary) (alterations in original). The court further provides historical support for that

conclusion when it references “one published bankruptcy opinion show[ing] an understanding even before 1978 that tribes could function as and claim the benefits of government.” *Id.*

Specifically, the panel majority relies on *In re Bohm's, Inc.*, a 1979 case which states that an “Indian tribe ought to be considered an instrumentality of the Federal Government for the purpose of determining priorities under the [pre-1978] Bankruptcy Act, and a conduit for government funds and resources.” *In re Bohm's, Inc.*, No. B-77-1142 PHX VM, 1979 Bankr. LEXIS 895, at *12-13 (Bankr. D. Ariz. Mar. 26, 1979). The panel majority relies on this Arizona Bankruptcy Court case to assert that “Congress was aware of the existing definition of ‘governmental unit’ when it incorporated it into § 106.” 33 F.4th at 606. Further, the panel majority states that Congress was “well aware when it enacted § 101(27) in 1978 and § 106 in 1994 that Indian tribes were legally “domestic dependent nations,” a term coined in 1831, and that domestic dependent nations are necessarily a form of domestic government. *Id.* (citing *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 2 (1831)).

Lastly, the panel majority draws support for its conclusion from the Bankruptcy Code’s structure, drawing support from the fact that the code goes beyond merely stripping immunity to providing benefits, and “in practice, tribes benefit from their status as governmental units,” especially in the collection of taxes. *Id.* at 608.

In his dissent, Chief Judge Barron writes that Congress did not mention tribes whatsoever in Section 101(27). *Id.* at 613. He notes that “Congress did not do so even though it did name many governmental types, including some that, like Indian tribes, enjoy an immunity from suit that Congress may abrogate only clearly and unequivocally.” *Id.* Chief Judge Barron offers the simple conclusion that “Congress did not mention Indian tribes in Section 101(27) because Congress did not intend to include them as “governmental unit[s].” *Id.* at 614 (citing *In re*

Greektown Holdings, LLC, 917 F.3d 451, 462 (6th Cir. 2019)) (“Congress’s failure to [explicitly mention Indian tribes], after arguably mentioning every other sovereign by its specific name, likely constitutes ‘[a] circumstance supporting [the] sensible inference’ that Congress meant to exclude them, pursuant to the familiar *expressio unius* canon”).

The Chief Judge addresses and refutes the textual arguments put forth by the majority, stating that “because we are trying to determine whether Congress—through that phrase—abrogated tribal sovereign immunity,” the court “must be convinced that there is no plausible way of reading those words to exclude Indian tribes.” *Id.* at 617. Chief Judge Barron also finds the legislative purpose argument not as clearly and unequivocally on the side of reading Section 101(27) to include Indian tribes, as the majority suggests. However, he admits some limitations of this argument. *Id.* at 623. Further, on the legislative history, he notes that the “legislative history makes no relevant mention of Indian tribes at all.” *Id.* at 624.

IV. PETITIONER’S CONTENTIONS

At the center of Petitioner’s argument is that “to abrogate tribal immunity, Congress must ‘unequivocally’ express that purpose.” Pet’r’s Br. 6 (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)). Per Petitioners, “common-law immunity from suit traditionally enjoyed by sovereign powers” is at the core of tribal sovereign immunity and must therefore be closely observed. *Id.* at 17. Because the bankruptcy code lacks any reference to Indian tribes, it does not provide the “perfect confidence” necessary to infer that Congress intended to abrogate tribal sovereign immunity. *Id.* at 13. The clear-statement rule requires that where there are other probable readings of Congress’s statement, a “court may not imply an abrogation of immunity.” *Id.* Petitioner contends that neither the text nor historical and policy considerations support an abrogation of tribal sovereign immunity here. *Id.*

A. Text

Petitioners contend that Congress easily could have, but did not, refer to Indian Tribes in the bankruptcy code and further that the most “straightforward” method Congress could have employed to abrogate tribal sovereign immunity would have been an explicit reference to tribes. *Id.* at 23. Per Petitioner, “numerous examples” exist in other statutes where tribes are mentioned separately alongside entities mentioned in Section 101(27). *Id.* Petitioner provides specific examples on this point, such as the Resource Conservation and Recovery Act” which “permits suits against a ‘person,’ which includes a ‘municipality’ that is then defined to include ‘an Indian tribe or authorized tribal organization or Alaska Native village or organization.’” *Id.* at 25. Petitioner further references similar examples in the Safe Drinking Water Act, the Clean Water Act, and the Federal Debt Collection Procedures Act.

In response to the panel majority’s contention that Congress need not use “magic words,” Petitioner distinguishes requiring magic words and looking to Congress’s practice in other contexts. *Id.* at 27. Therefore, it is “exceedingly odd,” Petitioners contend, to assume Congress chose a “different and more convoluted method of achieving the same result in the Bankruptcy Code.” *Id.* at 28.

Further, Petitioners contend that Reference to “other domestic government” fails to satisfy the clear statement rule. *Id.* at 30. The panel majority relies on dictionary definitions of “domestic” and “government” to infer abrogation. *Id.* Petitioners contend that dictionary definitions alone do not determine whether a statutory term is unambiguous, as separate dictionary definitions may not produce the same meaning as phrases when the words are joined together. *Id.* at 31. Petitioner further draws contrasts between the terms “domestic government” and “domestic dependent

nation,” arguing that it is at least questionable “if not entirely inaccurate” to hold those terms as equivalent. *Id.* at 33.

Petitioners also look to other textual and structural features of Section 101(27) to “undermine the conclusion that other domestic government encompasses Indian tribes.” *Id.* at 34. Petitioners argue the surplusage cannon has no role here because “there are more reasonable interpretations of ‘other domestic government.’” *Id.* at 40. Petitioners offer the Washington Metropolitan Area Transit Authority (WMATA) in answer to the contention that no other entity could be captured by the term ‘other domestic government.’” *Id.*

B. History

Petitioners argue that the unequivocal intention to abrogate tribal sovereign immunity must be found in the statutory text itself and may not be implied. *Id.* at 45. However, if considered, neither historical context nor policy supports abrogating tribal sovereign immunity. *Id.* at 45. Petitioners argue that “the panel majority’s sole authority for that supposed backdrop, however, is a single 1979 bankruptcy court decision ‘published’ in a reporter called Bankruptcy Court Decisions. *Id.* at 43. Petitioners also counter that reliance on floor statements is appropriate in this context. *Id.*

V. RESPONDENT’S CONTENTIONS

Respondent and Petitioners agree that the Band, as a federally recognized tribe, is “generally immune from suit.” Resp’t’s Br. 4 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014)). However, Respondent notes that tribal sovereignty is “in Congress’s hands” and Congress can “abrogate tribal immunity” by “unequivocally expressing that purpose.” *Id.* (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411,

418 (2001)). Therefore, the Respondent’s argument turns on the contention that Congress **clearly** abrogated tribal sovereign immunity in the Bankruptcy Code.

A. Text

Per Respondent, Congress used undisputedly clear language in 11 U.S.C. § 106(a) to abrogate the immunity of a ‘governmental unit.’” *Id.* at 9. Further, whether Congress has authorized suit against an otherwise immune defendant is a matter for the “traditional tools of statutory construction.” *Id.* at 14 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)). Respondent argues that the clear statement rule is one tool of many for interpreting whether Congress abrogated tribal sovereign immunity, requiring that “the intent to authorize suit must ‘be clearly discernable from the statutory text.’” *Id.* Section 101(27) defines a governmental unit for the purposes of sovereign immunity abrogation as including “other foreign or domestic government.” *Id.* at 16.

Turning to the dictionary definition, Respondent argues that a tribe is a domestic government. *Id.* Per Respondent, the relevant ordinary meaning of ‘government’ was then, as it is now, ‘the organization, machinery, or agency through which a political unit exercises authority and performs functions.’” *Id.* (citing Webster’s Third New International Dictionary 982 (1976)). Tribes perform those functions, so they are governments, per Respondent’s argument. *Id.* Tribes are also “domestic” under the dictionary definition. *Id.* at 20. Further, the Court has “many times used the word ‘domestic’ specifically to describe tribes. *Id.* Per Respondent, the Court has most often used the phrase “domestic dependent nations,” supporting the idea that the ordinary meaning of domestic includes tribes. *Id.*

Further, Respondent argues that reading the code as a whole confirms that the tribe is a “governmental unit.” *Id.* at 24 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991))

(“[T]he cardinal rule that a statute is to be read as a whole”). Respondents argue that because the filing of a bankruptcy petition operates “as a stay, applicable to all entities,” 11 U.S.C. § 362(a), the stay, injunction, and confirmation provisions apply to the tribe. Resp’t’s Br. 24. Therefore, a reading of tribal sovereign immunity from suit would “single out tribal governments (and tribally backed Internet payday lenders) for immunity from suits that the Code authorizes against the United States, the several States, and equally sovereign governments around the world.” *Id.* at 26. Respondent's point on this issue is an intentionalist one that argues it is implausible to believe Congress intended the outcome the text would require if read facially.

Additionally, Respondent points to other elements of the Bankruptcy Code that use “governmental unit” to refer to entities that carry out governmental functions such as the power to tax, police, and regulate the family, all functions tribes have and use. *Id.* at 27. Notably, the sections referenced in this argument do not include Section 101(27), the specific section dedicated to defining the bounds of sovereign immunity in the Code.

B. History

While Respondent argues that the case could be decided on the text alone, the Respondent also argues that the scope and history of the Bankruptcy Power show that the Code abrogates tribal sovereign immunity. *Id.* at 30. Respondent primarily relies on *Katz*, the “leading case on the relationship of the Bankruptcy Clause to sovereignty. *Id.* (citing *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362-63 (2006)). “*Katz* grounded its holding in “[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification.” *Id.* Respondent argues that since *Katz*, this Court has held that sovereign immunity has no place in bankruptcy, citing *Allen v. Cooper*, 140 S. Ct. 994, 1002-03 (2020), and further that Congress’s bankruptcy powers are in a

small category, along with eminent domain and war powers, in a small category of authorities that “give rise to structural inferences.” *Id.* (citing *Torres v. Texas Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2467 (2022)).

VI. DISCUSSION

Indian tribes have “long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citing *Turner v. U.S.*, 248 U.S. 354, 356 (1919)). It has also long been settled law that abrogation of sovereign immunity cannot be implied, but must be unequivocally expressed. *U.S. v. King*, 395 U.S. 1, 4 (1969). Therefore, without unequivocal congressional abrogation, tribes “are exempt from suit.” 436 U.S. 49 at 58.

The central question here is whether this Court should read as unequivocal a waiver of tribal sovereign immunity by Congress in the Bankruptcy Code, though one is not explicitly written. When interpreting the same language, courts below, in this case and in others, have come to opposing conclusions.

Petitioners have the better argument here, so the Court should hold that tribal immunity has not been abrogated. As Petitioners assert, Congress has, on many occasions, such as the Resource Conservation and Recovery Act, Safe Drinking Water Act, Clean Water Act, and the Federal Debt Collection Procedures Act, specifically referenced tribes when abrogating tribal sovereign immunity. Pet’r’s Br. 5. For example, the Resource Conservation and Recovery Act permits suits against a “person” which includes a municipality defined as:

“The term “municipality” (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, **or an Indian tribe or authorized tribal organization or Alaska Native village or organization**, and (B) includes any rural community or unincorporated town or village or any other

public entity for which an application for assistance is made by a State or political subdivision thereof.” 42 U.S. Code §§ 6903, 6972 (emphasis added).

As outlined in Petitioner’s brief, the Clean Water Act’s citizen-suit provision follows the same structure. *See* 33 U.S.C. §§ 1362(4)-(5), 1365(a)(1) (referring to “person,” which includes a “municipality” defined as an **“Indian tribe or an authorized Indian tribal organization”**) (emphasis added). Additionally, the Federal Debt Collection Procedures Act defines a “[g]arnishee”—a non-debtor “person” who may be the subject of a court-issued writ of garnishment, 28 U.S.C. § 3002(7)—and specifies that “person” includes “a State or local government **or an Indian tribe,**” *id.* § 3002(10) (emphasis added). These statutory provisions provide prime examples of what it means for Congress to abrogate tribal sovereign immunity unequivocally.

No such comparable language can be found in the Bankruptcy Code. Clearly, Congress can and does make its intent to abrogate tribal sovereign immunity clear and does so by writing it plainly. While magic words cannot and should not be required, the standard remains unequivocal expression. *Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Webster’s Dictionary should not be required to determine whether the statute includes tribes. Respondents offer no rationale for why Congress would have been so indirect in the Bankruptcy Code while it has been so plain in other places.

At the core of his argument, the Respondent asks the Court to infer an abrogation of tribal sovereign immunity where Congress does not clearly express its intent to do so. The Respondent advocates an unprecedented decision by this Court. Deciding for the Respondents could not only flood Bankruptcy Courts across the Country with tribal matters not previously faced, but it could also open the door to a deluge of challenges to tribal sovereign immunity in any and all statutes.

Finding for the Respondents would effectively shift the abrogation of tribal sovereign immunity from the exclusive purview of Congress to the whim of courts across the country. The sprawling 574 federally recognized tribes would face a hodgepodge of sovereign immunity, which would require significant time and money to resolve through courts. The disparity in resources amongst tribes, and in comparison to non-tribal entities, strongly counsels against moving toward that outcome. Tribes should not face drastically different limits to their sovereignty based on the whim of Webster and Oxford. The abrogation of tribal sovereign immunity ought to remain with Congress. The unique conditions tribal nations face, given the history of this country, counsel incredible care in this matter.

If Congress did intend to abrogate tribal sovereign immunity in the Bankruptcy code, it could adjust it toward its other clearer abrogation in other statutes, as it made similar adjustments in 1978 and 1994. Leaving this matter in the hands of Congress would avoid watering down the “unequivocal” standard moving forward. And not watering down this standard increases judicial efficiency and is observant of the separation of powers.

VII. RECOMMENDATION

I recommend the Court reverse the judgment of the Court of Appeals for the First Circuit.

Applicant Details

First Name	Danny
Middle Initial	C
Last Name	Williams Jr.
Citizenship Status	U. S. Citizen
Email Address	Williamsjr.danny11@gmail.com
Address	<div> <div>Address</div> <div> <div>Street</div> <div>2605 S Indiana Ave , Unit 903</div> <div>City</div> <div>Chicago</div> <div>State/Territory</div> <div>Illinois</div> <div>Zip</div> <div>60616</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	9189919455

Applicant Education

BA/BS From	University of Tulsa
Date of BA/BS	May 2018
JD/LLB From	Loyola University Chicago Law School
	https://shar.es/aHLcj5
Date of JD/LLB	May 8, 2024
Class Rank	50%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
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Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations

Just the Beginning Organization

Recommenders

Ho, Cynthia
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 14, 2023

The Honorable Judge Jemar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in the 2024 Judicial Term Clerk position with your chambers. As a third-year law student at Loyola University Chicago School of Law, I am confident that I possess the skills and experience necessary to excel in this role.

As a 2023 ABA Judicial Clerkship Program participant, I have developed a strong interest in the judiciary. I am passionate about justice and public service and am eager to contribute to the judicial system. I have demonstrated this commitment by completing two judicial externships in the United States District Court for the Northern District of Illinois. During my externship with Chief Judge Pallmeyer's chambers, I had the privilege of conducting legal research on a case involving the Fair Debt Collection Practices Act. As a judicial extern for Judge Thomas Durkin, I conducted legal research to draft Memorandum Opinion and Orders on Fourth/Fourteenth Amendment, Monell, and copyright infringement claims.

In addition, I have litigation experience from working with two law firms. I drafted motions to dismiss, motions for judgement on the pleadings, honed my attention to detail by drafting estate planning documents and assisting in discovery. Prior to law school, I worked for ExxonMobil which prepared me to excel in collaborative work environments. Moreover, my experiences refined my ability to receive and incorporate feedback and to meet strict deadlines.

I would welcome the opportunity to further discuss my qualifications for this position with you. Please find enclosed letters of recommendation from Assistant Dean Maureen Kieffer, Professor Cynthia Ho, and the Honorable Judge Sharon Holmes. Thank you for considering my application.

Sincerely,
Danny Williams Jr.

Danny C. Williams Jr.

2605 S Indiana Ave Unit 903 Chicago, Illinois 60616 | Williamsjr.danny11@gmail.com | (918) 991-9455

EDUCATION

Loyola University Chicago School of Law, Chicago, IL

Juris Doctor, Certificate in International Law, expected May 2024

- GPA 3.34/4.00 (Spring 2023); Rank 154/316 (As of Fall 2022)
- Dean's List (Spring 2022, Fall 2022, Spring 2023)
- Pugh-Kaufman Scholar
- 2023 ABA Judicial Clerkship Program participant
- Black Law Student Association (BLSA)
- Studied International law abroad in Rome, Italy (Summer 2022)

The University of Tulsa, Tulsa OK

Bachelor of Science in Business Administration, May 2018

- Majors: Energy Management and Finance
- Studied economics and international affairs abroad at University College Dublin, Dublin Ireland
- Big Brothers Big Sisters of Oklahoma, Mentor
- The University of Tulsa Division I Football Team, Member

EXPERIENCE

The Law Office of David Hyde, Chicago, IL

Law Clerk, August 2022- Current

- Under the supervision of counsel drafted a motion for judgement on the pleadings resulting in judgement in favor of the client in a breach of contract claim.
- Under the supervision of counsel drafted 735 ILCS 5/2-615 motions to dismiss claims against clients such as breach of contract, accounts stated, and breach of fiduciary duty.
- Performed high-level privilege review of requested discovery documents.
- Performed relevant case-law research for Counsel's active matters.

United States District Court for the Northern District of Illinois, Chicago, IL

Judicial Extern to the Honorable Judge Thomas Durkin, January 2023- May 2023

- Conducted legal research on Fourth/Fourteenth Amendment and *Monell* claims to draft a Memorandum Opinion and Order for the Judge's review regarding Defendants' 12(b)(6) motion to dismiss on the pleadings in a 42 U.S.C § 1983 suit against Cook County municipalities.
- Performed legal research on case law regarding copyright infringement under 17 U.S.C. §§ 101 et. seq., false marketing under 35 U.S.C. § 292(a), unfair competition violations of section 43(a) of the Lanham Act under 15 U.S.C. § 1125(a), commercial disparagement, statutory commercial disparagement under 815 ILCS 510/2(a), copyright misuse, copyright invalidity violations under 17 U.S.C. § 411 and FRCP Rule 9(b) pleading requirements to draft a Memorandum Opinion and Order for the Judge's review regarding Plaintiff's 12(b)(6) motion to dismiss Defendant's counterclaims and 12(f)(2) motion to strike Defendant's first affirmative defense.

Judicial Extern to the Honorable Chief Judge Rebecca Pallmeyer, August 2022- November 2022

- Conducted legal research to determine whether the court had the authority to reasonably reduce attorney fees for Plaintiff's counsel in an alleged violation of the Fair Debt Collection Practices Act where Defendant made an offer of judgement under FRCP Rule 68, and Plaintiff accepted the offer.

ExxonMobil Corporation Houston, TX

Land Representative, May 2018- May 2021

- Analyzed over 100,000 oil & gas leases and contracts in the Permian and east Texas production zones identifying key provisions such as acreage owned in each stratigraphic formation, term, and pugh language.
- Completed a rotational program through land management, land administration, acquisitions, and divestitures.
- Assisted in creating a 25,000-acre federal primary unit in the Williston Basin that resulted in 500,000 bbl./day.
- Formed four 640-acre units for designation in the Midland Basin resulting in over 1mm bbl./day.

Name: Danny Williams
Student ID: 00001596647
Birthdate :

Print Date: 6/10/23

Beginning of Law Record

Fall 2021

Term GPA	3.289	Term Totals	15.000	15.000	49.330
Cum GPA	3.220	Cum Totals	30.000	30.000	93.370

Program: Law - Full-time Division

Summer 2022

Course	Description	Attempted	Earned	Grade	Points
LAW 113	Civil Procedure	4.000	4.000	B-	10.680
LAW 152	Property	4.000	4.000	A-	14.680
LAW 162	Torts	4.000	4.000	B-	10.680
LAW 190	Legal Writing I	2.000	2.000	A	8.000
LAW 190R	Basic Legal Research	0.000	0.000	P	0.000
LAW 424	Prof. Identity Formation	1.000	1.000	P	0.000
Term GPA	3.146	Term Totals	15.000	15.000	44.040
Cum GPA	3.146	Cum Totals	15.000	15.000	44.040

Program: Law - Full-time Division

Course	Description	Attempted	Earned	Grade	Points
LAW 242	International Criminal Law	1.000	1.000	B	3.000
LAW 258	Intl Negot & Comm Skills	1.000	1.000	A-	3.670
Term GPA	3.335	Term Totals	2.000	2.000	6.670
Cum GPA	3.227	Cum Totals	32.000	32.000	100.040

Fall 2022

Program: Law - Full-time Division

Spring 2022

Program: Law - Full-time Division

Course	Description	Attempted	Earned	Grade	Points
LAW 122	Constitutional Law	4.000	4.000	B	12.000
LAW 132	Contracts	4.000	4.000	B	12.000
LAW 140	Criminal Law	3.000	3.000	B+	9.990
LAW 192	Legal Writing II	2.000	2.000	A	8.000
LAW 388	Global Access to Med: Patent	2.000	2.000	A-	7.340

Course	Description	Attempted	Earned	Grade	Points
LAW 176	International Trade Law	2.000	2.000	A	8.000
LAW 210	Evidence	4.000	4.000	B	12.000
LAW 409	Negotiation Weekend Workshop	1.000	1.000	P	0.000
LAW 410	Legal Writing III	2.000	2.000	A	8.000
LAW 599	Extern Intensive Fld Placement	3.000	3.000	P	0.000
Topic:	Government				
Term GPA	3.500	Term Totals	12.000	12.000	28.000